No. 86-

86-642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED TRANSPORTATION UNION,
Petitioner,

v.

W. G. TAYLOR, *et al.*,
Respondents.

PETITION OF UNITED TRANSPORTATION UNION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NORTON N. NEWBORN, ESQ.
(*Counsel of Record*)
Norton N. Newborn Co., L.P.A.
23811 Chagrin Boulevard #308
Cleveland, Ohio 44122
(216) 464-1400

Attorney for Petitioner United Transportation Union

Date: October 20, 1986

QUESTION PRESENTED FOR REVIEW

Does the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, make unlawful a provision in a labor agreement limiting union representation in grievance handling under that agreement to the craft designated collective bargaining representative?

DESIGNATED LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

1. W.G. Taylor
2. K.P. Brockhoeft
3. A.J. Ruiz
4. Wayne A. Sepcich
5. Brotherhood of Locomotive Engineers
6. Missouri Pacific Railroad Company
7. United Transportation Union

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Petitioner United Transportation Union (hereinafter, "UTU") respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review and, upon review, to reverse the decision by that Court in *Taylor, et al.* v. *Missouri Pacific Railroad Co., et al.*, 794 F.2d 1082 (5th Cir. 1986)

OFFICIAL REPORTS OF DECISIONS BELOW

Taylor v. *Missouri Pacific Railroad Company,*
794 F.2d 1082 (5th Cir. 1986),
affirming 614 F.Supp. 1320 (E.D. La. 1985)

The Court of Appeals opinion is Appendix A attached hereto.

JUDGMENT OR DECREE SOUGHT TO BE REVIEWED

The judgment or decree sought to be reviewed is that of July 23, 1986 in the United States Court of Appeals for the Fifth Circuit. Jurisdiction here is pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The pertinent statutory provisions are in Sections 1-3 of the Railway Labor Act, 45 U.S.C. §§ 151-153. A copy of Sections 1-3 is attached hereto as Appendix B.

JURISDICTION

Jurisdiction in the District Court was pursuant to 28 U.S.C. § 1331 and § 2201 regarding enforcement of the provisions of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

I. STATEMENT OF THE CASE

This action was brought for enforcement of the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"), and a declaration of rights thereunder. Plaintiffs-Respondents are four individuals employed by Defendant-Petitioner Missouri Pacific Railroad Company ("MOPAC") as switchmen, and one labor organization, the Brotherhood of Locomotive Engineers ("BLE"). They brought suit complaining that the labor agreement between Defendants-Petitioners UTU and MOPAC covering the switchmen craft for which the UTU is the RLA craft collective bargaining representative, unlawfully limits union handling of switchmen grievances at the company level to the UTU. Plaintiffs-Respondents claim that MOPAC switchmen have a right under the RLA to have the BLE, a separate labor organization and representative for the MOPAC engi-

neers craft, handle switchmen grievances. They claim in the present suit that the MOPAC-UTU contract, to the contrary, is unlawful under the RLA. The four individual Plaintiffs-Respondents held membership in the BLE while employed as switchmen under the UTU contract with MOPAC.

MOPAC moved to dismiss the Complaint on the ground of lack of subject matter jurisdiction or the exclusivity of the National Mediation Board ("NMB") or mandatory arbitration forums. Plaintiffs-Respondents and the UTU moved for summary judgment on the merits. In an Opinion filed March 20, 1985 and by final Order filed August 8 and entered August 9, 1985, the District Court noted that it had jurisdiction and granted Plaintiffs'-Respondents' Motion for Summary Judgment, declaring the MOPAC-UTU switchmen contract unlawful insofar as union grievance handling for switchmen at company-level proceedings was limited to the UTU. The District Court held the contract to this extent to be in violation of the RLA. 614 F.Supp. 1320 (E.D. La 1985). An appeal was taken, and the United States Court of Appeals for the Fifth Circuit affirmed the District Court. 794 F.2d 1082 (5th Cir. 1986).

II. STATEMENT OF FACTS

The facts here are generally as stated in the opinions below and are not in dispute. See, also, the O.B. Sayre Affidavit that was before the District Court and is Appendix C hereto.

Plaintiffs-Respondents are four individuals employed by MOPAC and one labor organization, the BLE, craft representative for MOPAC engineers. Defendant MOPAC is a "carrier" within the meaning of the RLA. The UTU is a labor organization representing employees primarily in the railroad industry. The UTU represents MOPAC switchmen, as well as MOPAC conductors and brakemen. These three crafts are generally known as "train service" crafts. The UTU generally represents these train service crafts, as well as firemen, in the

railroad industry. The BLE generally represents engineers in the industry. The engineers and firemen crafts are referred to as "engine service" crafts. The UTU-MOPAC contract for switchmen covering Plaintiffs-Respondents at the New Orleans Terminal provided that, as to handling grievances at the company level, the UTU was the exclusive union representative. The pertinent contract clauses so stating and so interpreted by the parties are set out in the Appendix to the District Court's March 20, 1985 "Order and Reasons". These exclusivity provisions had been in place for many years. The current agreement is, on its face, a 1974 "reprint". 614 F.Supp. at 1325-1327.

Taylor, et al, were employed as MOPAC switchmen at the New Orleans Terminal. At one time, Plaintiff Taylor had worked as an engineer. Switchmen have only an opportunity of first choice to move to engine service crafts, and there is no routine or significant movement between engine service and train service, including the switchmen's crafts. Traditionally, in the industry and at MOPAC engine service employees have seniority both as engineers and as firemen and work either job as the need and seniority required or permitted. See *General Committee* v. *Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977); *McElroy* v. *Terminal Railroad Association*, 392 F.2d 966 (7th Cir. 1968). In accord with this practice, traditionally either the engineers craft union (BLE) or the firemen's union (BLFE (Brotherhood of Locomotive Firemen and Enginemen), after 1968 the UTU) could handle any engine service employee's grievance regardless of which engine service craft worked by the employee. No similar joint seniority practice has existed as between engine service and train service crafts such as switchmen.[1]

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[1] A parallel practice existed within train service crafts before 1969 when there were multiple train service craft unions. See *O'Connell* v. *Erie Lackawanna R.R.*, 391 F.2d 168 (2d Cir. 1968); *Birkholz* v. *Dirks*, 391 F.2d 289 (7th Cir. 1968). With the formation of the UTU in 1969, there was only one train service union, the UTU.

In or about January, 1984, while working as switchmen, three of the four individual Plaintiffs-Respondents were subject to disciplinary investigation proceedings by MOPAC under the UTU switchmen contract. While Taylor, et al. were employed as switchmen, they held union membership in the BLE. Each sought to have a BLE representative handle his disciplinary investigation and grievance proceedings at the company level. MOPAC declined to allow such, based upon the existing contract provisions that limited switchmen discipline and grievance union representation to the UTU. 614 F.Supp. at 1321.

Based upon the foregoing facts not in dispute below, the District Court granted summary judgment to Plaintiffs-Respondents, invalidating the MOPAC-UTU contract insofar as it limited union representation in grievance handling thereunder at the company-level to the UTU. The United States Court of Appeals for the Fifth Circuit Affirmed.

III. THIS COURT SHOULD DECIDE THIS IMPORTANT ISSUE UNDER THE RAILWAY LABOR ACT: THE LEGALITY OF LIMITING COMPANY-LEVEL UNION GRIEVANCE HANDLING TO THE CRAFT COLLECTIVE BARGAINING REPRESENTATIVE.

The Fifth Circuit ruling decides an important question of federal law which has not been, but should be, decided by this Court. The question is that posed by this Petition, namely the legality under the RLA of the clause in the UTU-MOPAC agreement limiting Union representation in company-level grievance handling to the craft collective bargaining representative.

This is an important question of statutory interpretation under the RLA. The answer involves the judicial definition or reconciliation of two important statutory policies under the RLA, (1) the statutory policy of enhancing labor stability by according exclusivity to a duly designated collective bargaining representative and (2) the policy of employee choice in a

representative. The Court of Appeals, we believe, improperly construed the language and the policy and purposes of the Act.

A. The Important Labor Law Policy: Exclusivity And Stability In Collective Bargaining Is At Issue Here.

Exclusivity in collective bargaining representation and the stability derived therefrom has long been a central tenet of our federal labor laws. The RLA, first enacted in 1926, was this nation's first comprehensive collective bargaining law. Under that law, it was held by this Court that a covered employer must bargain with the craft labor representative when properly designated by a majority of the employees. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U.S. 515 (1937). The statutory duty to treat with the majority designated union was an "affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other". Indeed, it was the very fact of this exclusivity of representation in collective bargaining that led this Court to impose a duty of fair representation upon the labor organizations. *Steele* v. *Louisville & Nashville R.R. Co.,* 323 U.S. 192 (1944). The Fifth Circuit recognized below that the authority to negotiate a contract was an exclusive authority ("... [T]he BLE switchmen are not entitled to have BLE negotiate a separate collective bargaining agreement for them ...." 794 F.2d at 1085), but rejected exclusivity for handling of grievances in enforcement of that contract. We believe this Court should review whether such exclusivity under the RLA extends to grievance procedure representation at the company level. (As we shall note later, grievance handling beyond the company level is specially treated in the statute and is not at issue here.)

Under the Railway Labor Act, the issue of representation in grievance handling has been before the lower federal courts in a variety of cases. Two cases that have expressed views contrary to the Fifth Circuit here are *Broady* v. *Illinois Central,* 191 F.2d 73 (7th Cir. 1951), and *Butler* v. *Thompson,* 192 F.2d 831 (8th Cir. 1951). Those two Circuits expressed the view

that there was no provision in the Railway Labor Act that afforded a right of free choice of a representative for company-level grievance representation. The Seventh Circuit, in *McElroy, supra,* permitted the firemen's union (BLFE) to represent engineers in engineer grievances under the engineer's union (BLE) contract, despite an exclusivity clause in that contract, but carefully distinguished *Broady* and *Thompson* as well as other cases on the special factual pattern—the "unique situation"—presented by the *McElroy* dispute, namely the long established historical pattern of cross-representation as between the two engine service crafts. That issue of multiple union representation in the two engine service crafts was not present in *Broady* or *Thompson.* As noted earlier here, that fact situation is peculiar to the engine service crafts.

More recently, two District Courts have split on this grievance handling issue under the Railway Labor Act. In *Coar* v. *Metro-North Commuter Railroad,* 618 F.Supp. 380 (S.D.N.Y. 1985), multiple union representation was permitted; in *Landers* v. *National Railroad Passenger Corporation,* C.A. No. 84-467-K (Memorandum, Order June 24, 1986), it was denied. (A copy of the unreported *Landers* opinion is Appendix D.) In *Landers,* Judge Keeton commented on the interest of the contract union in controlling grievance handling:

> The courts and commentators have long recognized that the resolution of particular grievances and disciplinary actions will have a profound effect on the way a collective bargaining agreement is administered because those individual resolutions will become the precedents by which later disputes are decided.

The *Landers* case is now on appeal to the First Circuit.

In short, the authority to bargaining collectively is exclusive; exclusivity is a policy imposed to foster stable labor relations; since collective bargaining includes grievance handling with the employer, exclusivity should attach here as well

so as to comport with the policy of the law and ensure stable labor relations in grievance handling.

The lower courts and the National Labor Relations Board have also recognized the process of handling grievances to be collective bargaining under the Labor Management Relations Act, 29 U.S.C. § 151, *et seq.* (LMRA), and, thus, an activity to which the rights and duties of exclusive representation apply. In *Ostrofsky* v. *United Steelworkers of America,* 171 F.Supp. 782 at 793 (D. Md. 1959), *aff'd. per curiam* 273 F.2d 614 (4th Cir.), *cert. denied,* 363 U.S. 849 (1960), the District Court, in referring to the significance of the disposition of individual grievances in the collective bargaining process, said:

> In the handling of grievances, as in the negotiation of the terms of an agreement, the interest of all employees are involved. The principal purpose of the grievance procedure is not to provide a framework within which individual desires and complaints can be taken up with the employer; rather it is to provide a framework within which the employees may bargain collectively to determine how the general principles of the agreement are to be applied to day-to-day problems.
>
> The settlement of each grievance—whether voluntarily or by arbitration—establishes a precedent which will usually be followed in subsequent cases.

Under the LMRA or its predecessor, the National Labor Relations Act, it has long been held that where there is a designated craft collective bargaining representative, another union has no right to handle grievances. Indeed, the employer has no duty to treat and is forbidden to treat with another union. *Federal Telephone and Radio Company,* 107 NLRB 649 (1953). That is part and parcel of the concept of a collective bargaining representative. Collective bargaining authority is exclusive authority; collective bargaining extends to grievance handling; therefore, grievance handling authority is within the collective bargaining representative's exclusive authority.

In *Hughes Tool Company* v. *NLRB,* 146 F.2d 69 (5th Cir. 1945), the Fifth Circuit itself rejected the claim that the employees had a right to have a non-contract union handle their grievances where there was a craft representative. And this claim was rejected in the face of explicit language in the NLRA at Section 9(a) at that time limiting the exclusivity of representation to allow employees to present their own grievances. Section 9(a) of the 1935 law (quoted in *Hughes Tool)* included a proviso limiting the general grant of exclusive representation to a union. It was stated:

> . . . any individual employee or group of employees shall have the right at any time to present grievances to their employer.

Hughes Tool rejected extending this, however, to a minority union presenting grievances on the employees' behalf. The Court noted that Congress had rejected a broadening of the proviso.

Indeed, later cases have held that the right of employees under Section 9(a) of the NLRA to present grievances is only permissive and does not bind the employer to hear them. The employer need not entertain the grievance. See *Broniman* v. *A&P Tea Co.,* 353 F.2d 559 (6th Cir. 1965); *Black-Clawson Co.* v. *Machinists,* 313 F.2d 179 (2d Cir. 1962).

While LMRA cases are not directly applicable, they serve to show the wide recognition given to the policy of exclusivity in grievance handling in federal labor law.

That this exclusivity in grievance handling provides stability in labor relations has long been recognized. Discussing this exclusivity issue as to grievance handling in an article titled *Collective Bargaining During The Contract,* 63 *Harv. L. Rev.* 1097, 1100 (1950), the eminent labor law scholar, Archibald

Cox, said:

> ... However narrowly it may canalize its course, the execution of a contract does not complete collective bargaining . . . . There will be ambiguities in the agreement to be clarified and gaps to be filled . . . . Contract negotiations are the legislative process of collective bargaining; the day-to-day working out of plant problems is its administrative or judicial aspect . . . . To exclude the bargaining representative from the processing of grievances, or to admit a minority union, is also an unfair labor practice.

Carrying this concept of grievances a bit further, Professor Clyde W. Summers of Yale University Law School, in *Individual Rights in Collective Agreements and Arbitration,* 37 *N.Y.U. L. Rev.* 362 (1962), said:

> Collective bargaining is a system of industrial government in which governing power is shared by two collective entities—union and management. The collective agreement, in the words of the Supreme Court, "calls into being a new common law" which the parties agree shall be the law of the plant during the terms of the agreement. Its explicit provisions and implied terms provide a framework of rules which guide and control the parties in developing their industrial common law through the grievance and arbitration process.

Professor Cox, like other students of labor management relations, strongly advocates that the collective bargaining representative should have complete control of grievances. In *Rights Under a Labor Agreement,* 69 *Harv. L. Rev.* 601 at 625 (1956), Cox says:

> ... Through the prosecution of grievances, it [the union which is the duly designated bargaining representative] can daily demonstrate its effectiveness as the guardian of the employees' interests; successful settlement builds bonds of loyalty from those benefitted; and refusal to process underscores the union's authority. Conversely, grievances settled with unions or other unions make the majority

> union appear unnecessary if not ineffective and creates conflicting loyalties. More importantly, the union, as representative of all of the employees, has a collective interest in the individual's claim. If the claim is granted, it may be at the expense of other employees—seniority, promotion, and job assignment cases are only the most obvious examples. If the claim is denied, it may provide a precedent which casts a cloud over other employees' rights. The union has not only an interest but a responsibility to protect the other employees' right. In addition, it has a separable institutional interest that the bargain it has made not be remade or frittered away by individual actions . . . .

Professor Cox expresses this view in 61 *Harv. L. Rev.* 1 at 302 (1947):

> . . . Unless the majority representative may object to a proposed settlement, moreover, and carry the grievance up through the contract procedure to the next higher step, there will be created a "source of competitions and discriminations that could be destructive of the entire structure of labor relations in the plant". Ability to circumvent the majority representative in the handling of grievances would be a constant encouragement to the development of splinter groups and raiding by outside unions . . . .

While these judicial and scholarly opinions are offered in a variety of contexts, the underlying theme is that (1) exclusivity in collective bargaining representation is a major element in the stability of collective bargaining relations in industry; (2) grievance handling in the day-to-day enforcement of agreements is as important as the interpretation and negotiation process in collective bargaining; (3) it follows that generally the exclusive collective bargaining representative should, in the interest of stable labor relations, be the exclusive representative not only for purposes of negotiating and interpreting agreements, but for purposes of grievance handling as well, the day-to-day administration of the contract. The Fifth Circuit's ruling is at war with these basic policies of our federal labor laws.

In this regard, it should be noted that the undisputed evidence below was that there are approximately 13 national labor organizations on MOPAC. (Affidavit of O.B. Sayers, December 4, 1984, ¶2. See Appendix C.) This is the industry pattern. If the rule of the Court below succeeds so that an employee may have any union handle his grievance, it is not just the BLE and it is not just labor relations with respect to the switchmen that are potentially involved. All craft groups and contracts would be subject to claims to grievance handling from the 13 different unions where they obtain members in the craft. Indeed, the potential representative need not be a MOPAC union nor necessarily a union. If the statute allows choice in grievance handling, there is no basis to exclude particular choices. Thus, the policy issue is significant.

B. The Language Of The Railway Labor Act Has Not Been But Should Be Construed By This Court To Establish Exclusivity In Company-Level Grievance Handling And Certainly To Hold That The Statute Does Not Prohibit It.

The statutory language supports and does not bar exclusivity in grievance handling. Not only is there a very substantial policy in support of exclusivity in grievance handling, but the statutory language supports it. Most certainly the language of the Act does not preclude it. This Court should review that issue of statutory interpretation under the RLA.

Under the RLA, a labor union that is designated as the craft collective bargaining representative by the majority is deemed such *for all purposes under the Act.* That is the statutory language. This is the case whether the majority designation is made apart from or under NMB procedures. Under Section 2, Fourth, 45 U.S.C. § 152, Fourth, apart from NMB procedures, it is provided:

> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class *for the purposes of this Act.* (Emphasis added)

Under Section 2, Ninth of the Act, the statutory NMB designation process is established. Under Section 2, Ninth, the NMB is to handle disputes as to who or what is the designated representative. The NMB has responsibility to certify to the carrier those individuals or organizations "that have been designated or authorized to represent the employees involved . . .". (Section 2, Ninth, 45 U.S.C. § 152, Ninth) And:

> Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class *for purposes of this Act.* (Emphasis added)

In both Section 2, Fourth and Ninth, the majority designates its craft collective bargaining representative, and that representative is such for purposes of the Act. It is not such just for contract negotiation, but *for purposes of the Act.*

One of the purposes of the Act is certainly to regulate the handling of grievances as well as contract negotiation or interpretation. In 45 U.S.C. § 151a, the "General purposes" clause, one "purpose" identified is "to provide for the prompt and orderly settlement of all disputes growing out of grievances . . .". 45 U.S.C. § 151a(5). At Section 2, First it is provided that carriers and employees are to "exert every reasonable effort" to "settle all disputes" manifestly including grievances. At Section 2, Second, "all disputes", which includes grievances, are to be considered between representatives designated; at Section 2, Sixth it is the duty of the designated representatives to confer regarding grievances. In each of these four provisions of the law, it is plain that "grievance" handling is *one of the purposes of the Act* and specifically a task for the "designated representative". Thus, when, in Section 2, Fourth or Ninth, it is provided that the craft majority designated representative is the

representative "for purposes of the Act", absent clear language to the contrary, this must include grievance handling as well as contract negotiation or interpretation.

Section 2, Fourth and Ninth, as we have discussed them, were part of the 1934 amendments to the 1926 RLA. The 1934 amendments were an effort to improve the procedures for identifying the "designated or authorized representative" that had been referred to in the 1926 law. Even as to the 1926 law, it is manifest that the designated representative is the representative *for all purposes* under the Act. The 1934 amendments did not modify that basic concept of the 1926 law, but rather sought to improve the implementation. (H.R. Rep. No. 1944, 73rd Cong., 2d Sess. at 1, 2 (1934).

In the 1926 law, Section 2, Third was the only provision for protection of the process of choosing a representative. There it was provided:

> [r]epresentatives, for purposes of this Act, shall be designated by the respective parties . . .

without interference by the other. Then, in Section 2, Second and Fourth, were provisions concerning the duties of the representatives so designated.[2] Section 2, Second provided:

> All disputes . . . shall be considered . . . between representatives designated and authorized so to confer . . . .

Section 2, Fourth referred to grievances and provides that in disputes arising out of grievances or the interpretation or application of agreements:

> . . . it shall be the duty of the designated representative or representatives of such carrier and of such employees . . . to confer . . . .

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[2] Section 2, Fourth in the 1926 law became Section 2, Sixth in the law after the 1934 amendments.

Whether the reference be to the selection process (Section 2, Third) or the handling of disputes (Section 2, Second, "all disputes", or Section 2, Fourth, grievance disputes), the authority is the designated representative *for all purposes under the Act.* This was true under the 1926 Act, as well as the 1934 amendments.

Indeed, the 1934 amendments adding Section 2, Ninth underscored the exclusivity of the "designated representative". Section 2, Ninth provided not just for the NMB designation, but, as quoted above, that the carrier "shall treat" with the representative *for purpose of the Act.* In other words, the designated representative concept was not permissive. It was not just a grant of authority to the designated representative as one among many possible representatives. The carrier was required to deal—shall treat—with that designated representative. Section 2, Fourth and Ninth reflect that the majority designates the representative, and the carrier cannot interfere and *must* treat with that representative for all purposes under the Act, including grievances.

In the present case, the Court of Appeals said that ". . . no single provision of the Railway Labor Act [is] dispositive of this issue . . .". The Court of Appeals below supported its ruling primarily upon the statutory policy of employee free choice in selecting a representative, drawing upon some of the statutory provisions. The Court of Appeals noted among the general purposes of the RLA that of forbidding "any limitation upon freedom of association among employees". Other than that, the Court cited Section 2, Second and Section 2, Eleventh (c), 45 U.S.C. § 152 Second and Eleventh (c), as support for finding the policy of employee free choice sufficient in the law to serve to invalidate the agreement at issue.

With respect to the first of the three cited statutory provisions, one subparagraph of the "general purposes" clause at 45 U.S.C. § 151a(2), we believe the Court of Appeals misreads the quoted passage, and, in any event, it cannot

sustain the burden the Court put upon it. The Court noted a general purpose of the law "(2) to forbid any limitation upon freedom of association among employees . . .". We suggest that any fair reading of the legislative history shows that that "general purpose" of free association was put into the law because of employer actions interferring with union organization.

The legislative history makes clear that the concern Congress addressed in 1934 in articulating the "free choice" policy in what became 45 U.S.C. § 151a, as well as in other sections of the law, was its concern that railroad management was interferring, by various improper means, with employee freedom of choice in designating craft majority representatives. This was the nature of the Congressional policy of employee "free choice" in both the 1926 law and the 1934 amendments.

In the 1926 law, there was protection of employee free choice. This was manifestly protection against employer interference. This appears at Section 2, Third of the 1926 law. There, it was stated:

> Representatives, for purposes of this Act, shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives *by the other.* (Emphasis added)

That was the only statutory expression in the 1926 law concerning protection of choice of union representative. It was clearly the intent and purpose of that law, insofar as employee union choice was concerned, to protect that choice from management interference. It had nothing to do with protecting a right of choice to a second union in grievance handling once a majority designated union representative has been properly chosen without management interference.

The 1934 amendments were no different in purpose and policy. By 1934 it had become apparent that insofar as the

employees were concerned, this right of the employees to choice of a union without management interference was being denied in two significant ways. Management was refusing to recognize the employees' choice of representative and in various cases were supporting "company" unions. These were the two problems concerning employee free choice that were addressed by Congress in the 1934 amendments. The policy of the 1934 law as to free choice was a policy to protect that choice against abuses by carriers. This was no different than the 1926 law. The 1934 amendments merely sought to improve the enforcement of those policies. The 1934 amendments sought to provide a vehicle to assure that management would not unduly reject the employee representative's authority and further prohibited outright the company supported union as well as the so-called "yellow dog" contract, a pre-employment extraction of non-union or union choice. This appears in both the House and Senate Reports on the 1934 amendments. (H.R. Rep. No. 1944, 73rd Cong., 2d Sess., at 1, 2; S. Rep. No. 1065, 73rd Cong., 2d Sess., at 1, 2) At page 2, the House Report succinctly states the problem as to free choice reflected in both the 1926 and the 1934 laws.

> 6. The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery necessary to determine who are to be such representatives. These rights of the employees under the present act are denied by railway managements by their disputing the authority of the freely chosen representatives of the employees to represent them. A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is clearly contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. This bill is designed to correct that defect.

There is no suggestion by Congress in 1926 or 1934 that it was addressing in any fashion whatever the matter of permitting employees to have a choice of union representatives for grievance handling after a collective bargaining representative is fairly chosen by the majority. The problem was management's coercion and interference.

No one disputes the importance of choice in regard to the selection of a union. But there is no basis upon which to conclude that the RLA, either in 1926 or 1934, sought to protect employee choice to multiple union grievance handling once a majority craft representative was fairly chosen. And it is further clear that choice as to which union will negotiate contracts is at least as, and indeed perhaps more important than, choice in grievance handling. Yet the central purpose of the 1926 law and the 1934 amendments was to provide that, once the majority has fairly chosen its representative, the employees no longer have a choice outside of the designated union except to change the designated union. Congress so limited this most important element of employee choice, and there is little basis to say Congress excepted grievance handling from the majority choice.

As noted, the Court of Appeals here specifically relied upon Section 2, Eleventh (c), 45 U.S.C. § 152, Eleventh (c), to support finding that employee choice overrides the exclusivity of the collective bargaining representative's status in regard to grievance handling. Here, again, however, the Court was wide of the mark. The employee's right to choice of union in Section 2, Eleventh (c) has a purpose as reflected in a very specific history, all of which has nothing to do with the circumstances involved here and in which the Court of Appeals invokes it.

In 1951, Congress amended the RLA to permit union shop agreements whereby employees could be compelled to become members of the designated representative union as a condition of employment. One exception to this was provided in Section 2, Eleventh (c) in regard only to operating craft employees

whereby membership in any one national union, as delineated in the exception, would satisfy a union shop clause. The purpose of this exception was described in *Pennsylvania Railroad Co.* v. *Rychlik*, 352 U.S. 480 (1957). *Rychlik* said, in pertinent part:

> ... the sole aim of the [Eleventh (c)] provision was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members employment security, even if a members should be working temporarily in a craft for which another union is the bargaining representative.

What was referred to was protection or assurance against the problem of dual unionism in the context of firemen-engineer, conductor-brakemen intercraft movement, a long-standing historical practice. The problem, as *Rychlik* reflects was that where there was substantial intercraft movement, such as between firemen-engineer, an employee might be unduly compelled by union shop agreements to belong to two unions or to change and abandon one. There was concern that Union "A" might not permit an employee to join the union if the employee maintained membership in Union "B". If "A" had a union shop clause, plainly this would imperil the employee's employment security. This is what the Court in *Rychlik* meant when it said that it might be "impossible" to belong to two unions. This is readily seen upon examination particularly of the legislative history cited at footnote 21 of *Rychlik*.

There was also concern that employees would have to incur the expense of two unions. The Court said dual union membership might be "expensive and sometimes impossible". There was further concern that even if the employee were to and could opt to change unions as he changed crafts, this could be complicated and might mean "the loss of seniority and union benefits". The union benefits would include such items as insurance for members. These were the concerns before Congress. See *Hearings Before the Committee on Interstate and*

Foreign Commerce House of Representatives, on H.R. 7789, 81st Cong., 2d Sess. (1950), and *Hearings Before a Subcommittee of the Committee on Labor and Public Welfare on S. 3295,* 81st Cong., 2d Sess. (1950), as cited in *Rychlik* at footnote 21. Those are the problems that *Rychlik* correctly shows Congress was concerned with in adopting the Section 2, Eleventh (c) proviso. These are the problems of "employment security" for which Section 2, Eleventh (c) was designed to give the employees assurance. There is no basis in the legislative history which is (outlined in *Rychlik*) to suggest that in enacting Section 2, Eleventh (c) there was any consideration given with respect to grievance handling. See, also, *O'Connell* v. *Erie-Lackawanna R.R.,* 391 F.2d 168 (2d Cir. 1968); *Birkholz* v. *Dirks,* 391 F.2d 289 (7th Cir. 1968). The protection of membership in Section 2, Eleventh (c) was designed to protect membership rights in regard to the limited cases where there was intercraft and thence inter-union movement, particularly engineer-firemen and, at that time, but no longer, conductor-brakemen. No intercraft movement obtains in regard to Plaintiffs in the instant case. *Rychlik* and the legislative history reflect that the Section 2, Eleventh (c) proviso had an important role to play that had nothing to do with grievance handling. There is no basis for the Court below to say that Section 2, Eleventh (c) protection relates to or supports multiple union grievance handling in this case.

Finally, the Court of Appeals below adverts to Section 2, Second, 45 U.S.C. § 152, Second, wherein it is said that "all disputes" shall be considered "between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute". 794 F.2d at 1086. The Court concludes that this reference to "representatives designated" is not limited to the craft chosen or craft designated representative. It refers as well, the Court said, to the "national union to which the employee belongs". While the Court said "national" union, there is nothing in Section 2, Second that remotely could create such a distinction.

Any union could then be the grievance union. Indeed, under the approach of the Court below, any entity, if designated, can be the representative. Once the statutory language of "designated representative" is cut loose from being limited to the craft designated representative, what justification is there in Section 2, Second for limiting the designated representative to a "national union"? There is none. (The limitation to a "national" union in Section 2, Eleventh (c) applies only to operating crafts and has no bearing on Section 2, Second.)

The statute does make one specific departure from the "designated representative" limitation on employee representation. The exception in substance proves the rule. That exception occurs in regard to handling cases at arbitration before the NRAB. At Section 3, First (j), 45 U.S.C. § 153, First (j), it is provided that the "parties", including an employee:

> . . . may be heard either in person, by counsel, or by other representatives, as they may respectively elect . . . .

Here is an explicit departure from the Section 2 "designated representative", and this Court has accordingly held that an employee is entitled to a choice of representative at NRAB arbitrations. *Elgin, Joliet & Eastern Ry. Co.* v. *Burley,* 325 U.S. 711 (1945), *opinion adhered to on rehearing,* 326 U.S. 801 (1946); see, also, *Estes v. Union Terminal,* 89 F.2d 768 (5th Cir. 1937). Here Congress intended to permit departure from the designated representative, and it was so stated. Where no such exception has been suggested for grievance handling on the railroad property, the rule of exclusive representation ought to remain in place.

Further, the Court of Appeals' reliance on *McElroy* v. *Terminal Railroad Association,* 392 F.2d 966 (7th Cir. 1968), *cert. den.* 393 U.S. 1015 (1969), *General Committee of Adjustment* v. *Burlington Northern, Inc.,* 563 F.2d 1279 (8th Cir. 1977), *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western Ry. Co.,* 411 F.2d 1115 (10th Cir. 1969),

should be reviewed in regard to the important statutory question at issue here. As to *McElroy,* the Court of Appeals failed to take note that while *McElroy* spoke broadly, nevertheless it is clear from the *McElroy* Court's opinion that the peculiar and virtually unique history of cross-craft grievance representation within the two engine service craft unions was at the heart of the decision. That was how *Broady* and *Butler* in particular were able to be distinguished. To extend such multiple union representation among crafts beyond the very limited tradition reflected in *McElroy* and in the face of the statutory language and policies we have described should not be countenanced. With respect to *General Committee of Adjustment* v. *Burlington Northern, Inc., supra,* and *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western Ry. Co., supra,* reliance upon them was misplaced in two respects. First, both of these cases involved the two engine service craft unions, where the cross-representation tradition was well established. Second, both of these cases involved questions of union grievance handling *at arbitration.* Such a right to representation at arbitration is governed by Section 3 of the Act, not Section 2. The *Burlington Northern* and *Denver & Rio Grande Western* cases both turned on statutory claims under Section 3, particularly Section 3, Second, 45 U.S.C. § 153, Second. (See *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western Ry. Co., supra,* at footnote 1; see *General Committee of Adjustment* v. *Burlington Northern, Inc., supra.*) Indeed, as we noted, the statute at Section 3, First (j) clearly allows a broad right of representation at arbitration. See *Elgin, Joliet & Eastern, supra.*

IV. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI HERE BECAUSE OF A CONFLICT AMONG THE CIRCUITS AS TO THE RAILWAY LABOR ACT.

The precise issue passed upon by the Fifth Circuit below was whether Section 2 the Railway Labor Act requires that an employee is entitled to have a representative of his choice

handle his grievance at the company level of grievance proceedings. The Fifth Circuit said yes. Two other Circuits have said no.

In *Broady* v. *Illinois Central, supra,* the Seventh Circuit was faced with a claim that an employee charged in a disciplinary proceeding was entitled "to be represented at such [disciplinary] hearing by a representative of his own choosing . . .". The employee had refused to proceed without his preferred representative, was ultimately dismissed, and sued to gain his job back. While ultimately the Court of Appeals affirmed a lack of jurisdiction over the action because it was one for reinstatement, in addressing the claim of a violation of the Railway Labor Act in regard to choice of representative at the company hearing, the Court said:

> We can find no provision of the Railway Labor Act which gives to employees the right to a representative of their own choice at an investigation by company officials of a charge that the employee has violated company rules.

The Court went on to state that under the Act, the employee would only have a choice where the statutory language so prescribed, namely ". . . when the officials of the company have completed their inquiry and entered a finding . . .", that is when the matter was referred to arbitration. This right to choice at arbitration is, of course, predicated upon specific statutory language concerning the arbitration process in Section 3 of the Act. *Elgin, Joliet and Eastern Ry. Co.* v. *Burley, supra.*

The Eighth Circuit Court of Appeals in *Butler* v. *Thompson, supra,* followed *Broady* in concluding that the Railway Labor Act did not accord a right to an employee to choose a grievance representative at the company level. Both of these Circuits are in conflict with the views of the Fifth Circuit in the present case.

Petitioner believes that this Court should resolve this conflict among the Circuits on this most important point of law under the Railway Labor Act.

CONCLUSION

For the reasons set forth herein, Petitioner UTU respectfully asks that the writ be issued as requested herein.

Respectfully submitted,

NORTON N. NEWBORN
(Counsel of Record)
NORTON N. NEWBORN Co., L.P.A.
23811 Chagrin Boulevard #308
Cleveland, Ohio 44122
(216) 464-1400
Attorney for Petitioner United Transportation Union

Date: October 20, 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

W. G. TAYLOR, ET AL.,
Plaintiffs-Appellees,

v.

MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,
Defendants-Appellants.

Filed July 23, 1986

Before: Thomas Gibbs Gee, Henry A. Politz, and Will Garwood, Circuit Judges.

Opinion by Judge Henry A. Politz

Appeal from the United States District Court
for the Eastern District of Louisiana
Adrian G. Duplantier, District Judge, Presiding

OPINION

HENRY A. POLITZ, Circuit Judge:

The district court granted declaratory and injunctive relief sought by four individual plaintiffs and by the Brotherhood of Locomotive Engineers (BLE) pursuant to the Railway Labor Act (RLA), 45 U.S.C. §§ 151 *et seq.* 614 F. Supp. 1320 (E.D.La. 1985). Defendants Missouri Pacific Railroad Company (MOPAC) and the United Transportation Union (UTU) appeal, challenging the court's jurisdiction and its contractual

interpretation. Concluding that the court had jurisdiction over the subject matter, that the claims are justiciable, and that the district court was correct in its analysis, we affirm.

BACKGROUND

The four individual plaintiffs are employees of MOPAC and members of BLE, a craft union that is the exclusive bargaining representative for MOPAC's locomotive engineers. The individual plaintiffs are not engineers, however, but switchmen in MOPAC's Avondale, Louisiana yard, enjoying only a "first preference" to transfer into engine service. UTU is certified as the exclusive bargaining representative for MOPAC's switchmen.

During 1983 and 1984 the individual plaintiffs were involved in company-level disciplinary or grievance proceedings. In each instance they requested representation by the BLE. MOPAC refused these requests on the grounds that the MOPAC-UTU collective bargaining agreement specified that only the UTU could represent a switchman at company-level disciplinary and grievance hearings.

The instant complaint sought: (1) a declaration that the provisions of the MOPAC-UTU collective bargaining agreement limiting switchmen to UTU representation at company-level proceedings violated the individual plaintiffs' rights under the RLA; (2) an injunction prohibiting enforcement of these provisions; and (3) damages, a claim subsequently waived.

MOPAC moved to dismiss the complaint, contending that the district court lacked jurisdiction because the claims involved disputes within the exclusive jurisdiction of the National Mediation Board (NMB), the National Railroad Adjustment Board (NRAB), or a special adjustment board. The district court found jurisdiction and, on the parties' cross-motions for sum-

mary judgment, held for the plaintiffs in a scholarly and comprehensive opinion. To the extent that the MOPAC-UTU exclusive representation provisions prevented a switchman from selecting his own union to represent him at company-level proceedings, the provisions were declared void and their enforcement enjoined.[1] MOPAC and UTU appeal.

ANALYSIS

Subject-matter Jurisdiction

Contending that the dispute at bar falls within the exclusive jurisdiction of the NMB, NRAB, or a special adjustment board, MOPAC challenges the court's jurisdiction over the subject matter. The point deserves serious consideration and discussion.

Under the RLA, disputes between an employer and its employees, and the union representing the employees, are characterized as "major," "minor," or "representation." Under 45 U.S.C. § 153 First (i), minor disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred . . . to the [National Railroad] Adjustment Board. . . ." *See generally International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983) (*"IBT v. TIA"*). MOPAC vigorously maintains that plaintiffs' claims involve the interpretation of the MOPAC-UTU collective bargaining agreement. Notwithstanding MOPAC's skillful argument to the contrary, we conclude that the pertinent contractual provisions, reprinted in 614 F. Supp. at 1325-26, are clear and unambiguous and require no interpretation. Accordingly, the NRAB has no jurisdiction over plaintiffs' claims, and *a fortiori,* neither would a special adjust-

[1] The injunction was made prospective only since the claims of the individual plaintiffs had been mooted.

ment board, 45 U.S.C. § 153 Second (special adjustment board may decide "disputes of the character specified in" 45 U.S.C. § 153).[2]

MOPAC's argument that the plaintiff's claims fall within the exclusive jurisdiction of the NMB is more substantial. The NMB has exclusive jurisdiction over representation disputes involving the determination of the proper representative of a class of employees. 45 U.S.C. § 152 Ninth; *IBT v. TIA.* At first blush, a functional analysis would reflect that MOPAC's position is sound. By gaining BLE representation at company-level proceedings, the argument posits, the plaintiffs could trigger a conflict between the BLE and the UTU. BLE representation of BLE-represented switchmen at company-level proceedings could, conceivably, undercut UTU's position as the exclusive bargaining representative of the switchmen. Were such a dispute between BLE and UTU to occur, and were it to implicate UTU's bargaining position, we would be faced with a representation dispute within the NMB's exclusive jurisdiction. That is not, however, the situation presented by the instant case.

As the district court astutely recognized, it is the plaintiffs' position that the exclusive representation provisions at bar are *invalid* when applied to hearings involving switchmen who are not members of the UTU. Whether a provision of a collective bargaining agreement is valid is a legal decision, classic grist for the judicial mill. *Felter v. Southern Pacific Co.,* 359 U.S. 326 (1959). The district court properly took jurisdiction over this case. 614 F. Supp. at 1322., *Accord McElroy v. Terminal Railroad Ass'n of St. Louis,* 392 F.2d 966 (7th Cir. 1968), *cert. denied,* 393 U.S. 1015 (1969); *Coar v. Metro-North Commuter R. Co.,* 618 F. Supp. 380 (S.D.N.Y. 1985).

Right of Representation

The issue posed by this appeal is whether the provisions of the MOPAC-UTU collective bargaining agreement, limiting all

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[2] MOPAC does not argue that the instant claims present a "major dispute" under the RLA. *See* 45 U.S.C. § 156; *IBT* v. *TIA.*

switchmen, including those who are members of the BLE, to UTU representation at company-level grievance and disciplinary proceedings, are valid under the RLA. Finding no single provision of the RLA dispositive of this issue, we must attempt to divine congressional intent and priorities.

The general purposes of the RLA are set out in 45 U.S.C. § 151a:

> The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

In addition to the prohibition on "any limitation upon freedom of association among employees" contained in 45 U.S.C. § 151a(2), Section 2 Eleventh (c) of the RLA, 45 U.S.C. § 152 Eleventh (c), provides that while a collective bargaining agreement may require an employee to belong to a national labor union as a condition of employment, it cannot mandate which union. These provisions persuade us that Congress attached significant importance to an employee's freedom to choose his or her representative and to belong to the union preferred by the employee.

The right to associate freely with a national union of an employee's own choosing, and the effects of the exercise of that right, however, are not unlimited. In the instant case, for example, the BLE switchmen are not entitled to have BLE negotiate a separate collective bargaining agreement for them;

rather, the terms and conditions of their employment necessarily are governed by the MOPAC-UTU agreement covering switchmen. *See, e.g., Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). On the other hand, given the apparent importance Congress attached to freedom of choice, that right should be limited only when compelled by express language of the RLA. We find neither statutory language mandating such a result nor compelling reason to limit the right of free choice in the instant case. Indeed, we perceive the opposite.

In exercising the freedom to choose membership in a national union, an employee may consider myriad factors: some personal, some business-related; some apparent, others less apparent; some objectively, soundly based, others perhaps questionable; all reflecting the essence of free choice. An employee selecting a union opts for the benefits, burdens, and costs attendant upon membership in that union. In return, the union owes the member certain duties. The relationship is symbiotic. An obvious and primary benefit to the employee is the right to have the chosen union provide personal representation in any dispute the employee might have with the employer. Such typically are matters of great interest and concern to the individual employee.

Because the UTU was the exclusive bargaining agent for MOPAC's switchmen during the contract-negotiation process, the benefits of membership in the BLE were necessarily sublimated. To extend that sublimation beyond contract negotiation to include company-level grievance and disciplinary proceedings would render membership in the BLE nugatory, and make that union the equivalent of a social organization rather than a vital national labor union of railroad employees. That extension would effectively nullify the RLA's specific emphasis on the employee's freedom to choose a union in situations as are here presented.

The district court's decision manifestly is consistent with the stated goals of the RLA. Only specific language of the RLA

would warrant rejecting the trial court's findings and conclusions. We have been cited to no such language, and find none.

The RLA provision applicable to company-level proceedings is § 2 Second, 45 U.S.C. § 152 Second, which provides:

> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

The language pertinent to the instant inquiry is "representatives designated and authorized . . . to confer . . . by the employees . . . interested in the dispute." Does this language refer only to the certified bargaining agent, or does it include the national union to which the employee belongs? We are persuaded to the latter.

Under this statute, company-level proceedings are to involve a representative "designated . . . by the employees . . . interested in the dispute." The reference is not generic, it is individualized. The craft or body of switchmen might be interested only inferentially in a particular disciplinary or grievance hearing, which might be entirely fact-bound with no overriding policy implications. The individual, in such an instance, would have a vital interest; that individual is the employee "interested in the dispute." The individual should be permitted to select his or her representative. Only in that manner would the heralded right to free selection of union membership be accorded the status and dignity explicit and implicit in the relevant statutes.

We conclude by noting that our decision today accords with the holdings or leanings of our colleagues in the Seventh, Eighth, and Tenth Circuits. *McElroy; General Committee of Adjustment v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977); *Brotherhood of Locomotive Engineers v. Denver &*

R.G.W.R. Co., 411 F.2d 1115 (10th Cir. 1969); *accord Coar*. We further note that our holding today creates no conflict between the RLA policy of freedom of union choice for the employee and the stated goals of company-level settlement of disputes, 45 U.S.C. § 152. First, and the transcending desire for labor-management stability. *See Coar*, 618 F.Supp. at 384 (*quoting* pertinent congressional testimony).

The judgment of the district court is AFFIRMED.

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The judgment of the district court is AFFIRMED.

APPENDIX B

The Railway Labor Act

Being An Act To provide for the prompt disposition of disputes between carriers and their employees and for other purposes

(U.S. Code, Title 45, Chapter 8)[1]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I[3]

DEFINITIONS

SECTION 1. When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control

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[1] (Public Law 257, 69th Cong.) (H.R. 9465); (Approved May 20, 1926), The Railway Labor Act (44 Stat. L. 577).

(Public Law 442, 73rd Congr.) (H.R. 9861), An Act to amend the Railway Labor Act approved May 20, 1926. (Approved June 21, 1934.)

That Section I of the Railway Labor Act is amended to read as follows: (Followed by text governing carriers by railroad and related transportation agencies.) (45 Stat. L. 926.)

[3] Title II, (Public Law 487, 74th Cong.) (S. 2496), An Act to amend the Railway Labor Act. (Approved Apr. 10, 1936.)

That the Railway Labor Act, approved May 20, 1926, as amended, herein referred to as "Title I" is hereby further amended by inserting after the enacting clause the caption "Title I" and by adding the following Title II. (Followed by Title II governing air carriers.) (48 Stat. L. 1185.)

with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. *The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to carrier where delivery is not beyond the tipple, and the operation of equipment or facilities therefor, or any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Baord" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between

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* Final paragraphs to Section 1 First and 1 Fifth marked by asterisks are amendments by the Act of Aug. 18, 1940 (Public Law 764).

(Public Law 914, 81st Cong.) (S.3295); (Approved Jan. 10, 1951) providing for union membership. (See Sec. 2, eleventh.)

any Territory, and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission. *The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

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* Final paragraphs to Section 1 First and 1 Fifth marked by asterisks are amendments by the Act of Aug. 18, 1940 (Public Law 764).

(Public Law 914, 81st Cong.) (S.3295); (Approved Jan. 10, 1951) providing for union membership. (See Sec. 2, eleventh.)

Seventh. The term "district court" includes the Supreme Court of the District of Columbia; and the term "circuit court of appeals" includes the Court of Appeals of the District of Columbia.

This Act may be cited as the "Railway Labor Act."

GENERAL PURPOSES

SECTION 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limiation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

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* Added by amendment by the Act of Aug. 18, 1940 (Public Law 764).

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, is possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth.[3] Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other

[3] Amended by Public Law 914, 81st Cong. (See Sec. 2 eleventh.)

contribution payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, of other contribution: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnisning free transportation to its employees while engaged in the business of a labor organization.

Fifth.[3] No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

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[3] Amended by Public Law 914, 81st Cong. (See Sec. 2 eleventh.)

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirement of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall

designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purpose and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh.[3] Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) To make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) To make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be

[3] Added by amendment (Public Law 914, 81st Cong.) (S. 3295); (Approved Jan. 10, 1951).

revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in Section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of Section 2 of this Act in conflict herewith are to the extent of such conflict amended.

NATIONAL BOARD OF ADJUSTMENT; GRIEVANCES; INTERPRETATION AGREEMENTS

SECTION 3. First. There is hereby established, a Board to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby, provided—

(a)[4] That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

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[4] Amended by Public Law 234, 91st Congress, (H.R. 15349); (Approved April 23, 1970).

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with Section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the

Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h)[4] The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be a follows: First division: To have jurisdiction over disputes involving train-and-yard-service employees of carriers; that is (engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

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[4] Added by amendment (Public Law 234, 91st Congress) (H.R. 15349); (Approved April 23, 1970).

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheetmetal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signalmen, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carrier and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such disputes must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of

the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, division shall make an order to the petitioner stating such determination.[5]

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties,[5] and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expense of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be

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[5] (Public Law 456, 89th Cong.) (H.R. 706); (Approved June 20, 1966).

taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board; *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.[5]

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the

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[5] (Public Law 456, 89th Cong.) (H.R. 706); (Approved June 20, 1966).

court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.[5]

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman; *Provided, however,* That the chairmanship and vice chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice chairmanship shall be held alternately by a representative of

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[5] (Public Law 456, 89th Cong.) (H.R. 706); (Approved June 20, 1966).

the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and

any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the

special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon the award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.[5]

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[5] (Public Law 456, 89th Cong.) (H.R. 706); (Approved June 20, 1966).

APPENDIX C

UNITED STATES DISTRICT COURT
Eastern District Of Louisiana

W. G. TAYLOR, K. P. BROCKHOEFT,
A. J. RUIZ, WAYNE A. SEPCICH AND
BROTHERHOOD OF LOCOMOTIVE
ENGINEERS

Versus

MISSOURI PACIFIC RAILROAD
COMPANY AND UNITED
TRANSPORTATION UNION

AFFIDAVIT OF O. B. SAYERS

BEFORE ME, the duly undersigned authority, personally came and appeared O. B. Sayers, who, after first being sworn, states that the following facts are true and correct and within his personal knowledge:

(1) I am presently employed at the Missouri Pacific Railroad Company as Assistant Vice President, Labor Relations. In my position as Assistant Vice President, I am the highest officer at the Missouri Pacific Railroad Company (MoPac) designated to handle disputes arising under the various collective bargaining agreements between MoPac and the respective uinions that have members working for MoPac.

(2) The Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU) are two of the thirteen standard railroad unions which represent various MoPac employees working in the various crafts or classes. Three other unions, which are not standard railroad unions, also represent some MoPac employees.

(3) Defendant UTU is the duly designated collective bargaining representative pursuant to the Railway Labor Act for employees of defendant MoPac working in the craft or class of conductors, trainmen, and switchmen.

MoPac and the UTU entered into a Collective Bargaining Agreement governing the rates of pay, rules, and working conditions for the craft or class of conductors, trainmen, yardmen, and switchmen, including seniority provisions, discipline and discipline investigation rules, and machinery for the resolution of disputes involving the interpretation and application of the Collective Bargaining Agreements relating to those individuals. A copy of the governing Collective Bargaining Agreement between MoPac and the UTU is attached as Exhibit "A" hereto.

(4) Plaintiff BLE is the duly designated collective bargaining representative under the Railway Labor Act for employees of defendant MoPac working in the craft or class of engineers. MoPac entered into a collective bargaining agreement with the BLE governing the rates of pay, rules, and working conditions for the craft of engineers; this collective bargaining agreement also controls seniority provisions, discipline and investigation rules, and machinery for the resolution of disputes involving the interpretation and application of the collective bargaining agreements related to those engineers. A copy of the applicable Collective Bargaining Agreement is attached hereto as Exhibit "B".

(5) The named individual plaintiffs are presently employed by the defendant Missouri Pacific at its Avondale, Louisiana yard, and have seniority in the craft of switchmen.

(6) These named individual plaintiffs were originally hired as switchmen by the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, which was a wholly owned subsidiary of defendant MoPac. On December 31, 1977, the TP-MP was merged into the MoPac.

(7) Prior to August 1983, no switchmen working as such on the TP-MP or MoPac, including those who have the right to or had acquired engineer seniority, had sought to be represented by the BLE in the handling of claims or grievances on the property arising within the craft of switchmen.

(8) Plaintiff Taylor worked as a switchman from September 23, 1967 through March 23, 1980, and then worked as an engineman from March 24, 1980 to August 16, 1982. From August 1982 until the present time, Mr. Taylor has worked continuously as a switchman.

(9) While working as switchman, the rates of pay, rules, and working conditions are governed by the agreement between the UTU and MoPac. The agreements between the BLE and MoPac do not govern the rates of pay, rules, and working conditions of individuals working as switchmen. There are separate seniority rosters for switchmen and enginemen.

(10) While working as an engineman, the rates of pay, rules, and working conditions are governed by the agreement between plaintiff BLE and MoPac. The agreement between the UTU and MoPac does not govern the rates of pay, rules, and working conditions of the individuals who are working in engine service.

(11) Affiant further states that engineers working for the Missouri Pacific are qualified on the mechanical rules and functions of locomotives, while switchmen are not. While working as switchmen, employees are prohibited from operating locomotives.

(12) On or about January 1, 1984, all of the individual plaintiffs were working as switchmen.

(13) In or about January 1984, MoPac convened a hearing to consider the charges filed against the plaintiffs Taylor, Ruiz, and Sepcich with respect to possible misconduct while working as switchmen. MoPac convened a company level investigation in accordance with the MoPac-UTU Collective Bargaining Agreement governing switchmen (Exhibit A).

(14) The individual plaintiffs sought to have BLE local chairman W. L. LaNassa as their representative at the company level investigation for possible misconduct while working as switchmen.

(15) MoPac advised the BLE that, based upon its interpretation of the Collective Bargaining Agreement between MoPac and the UTU, the BLE would not be allowed to represent the individual plaintiffs at the company level investigation. MoPac further advised the BLE that the collective bargaining agreement between MoPac and the UTU exclusively governs claims and grievances at the company level for employees while working as switchmen. MoPac, however, has not refused to allow the BLE to represent individual plaintiffs at levels beyond company level proceedings. Similarly, MoPac has not refused to allow the BLE to represent employees who are working as engineers at company level proceedings.

(16) MoPac's decision not to allow the BLE to represent switchmen at company level disciplinary proceedings is based upon MoPac's interpretation of Articles 18 and 23 involving discipline, grievances, and representation of switchmen. In addition, MoPac's position is supported by the fact that such grievance and disciplinary proceedings before the carrier have been handled in the same manner in the past, and, thus, this approach represents the usual manner for the handling of grievance and disciplinary matters.

(17) Affiant further notes that the Collective Bargaining Agreement between the BLE and MoPac similarly provides that only the BLE will represent engineers working for the Missouri Pacific in disciplinary and grievance proceedings on the property.

(18) MoPac believes that based upon its interpretation of the Collective Bargaining Agreement between MoPac and the UTU, it would be a flagrant violation of the UTU agreement to

allow the BLE to represent switchmen at disciplinary and grievance proceedings at the company level. Likewise, it would be violative of the agreement between MoPac and the UTU to allow any of the other fourteen unions that have agreements with MoPac to represent switchmen in discipline or grievance matters while those individuals are working as switchmen for the Missouri Pacific.

(19) Affiant states that he has reviewed the Affidavit of D. F. Riley, who is the General Chairman of the General Committee of Adjustment, Brotherhood of Locomotive Engineers. A copy of Mr. Riley's Affidavit, which was submitted by the BLE in the case of *Peters* v. *National Railroad Passenger Corporation and BLE,* No. 83-3431 on the docket of the United States District Court for the District of Columbia, is attached hereto as Exhibit "1".

(20) MoPac agrees with Mr. Riley's sworn statements that the collective bargaining agreements between a carrier and a union, such as the collective bargaining agreement between MoPac and the UTU, require that the carrier cannot allow any other union to handle claims or grievances at the company level involving employees covered by the agreement relative to that specific craft.

(21) MoPac agrees with the statements of BLE Chairman Riley (Exhibit "1") that if a rival union is permitted to handle claims or grievances at the company level, the collective bargaining process would be undermined. Such a procedure likewise would impact on specific contractual provisions negotiated between the carrier and the respective union, without the signatory union's approval as a collective bargaining representative.

(22) There did not exist shuttling between crafts by the plaintiffs in this case. As indicated above, very few employees of the MoPac have even worked in more than one craft.

(23) The Missouri Pacific believes that it would be extremely disruptive to the business of the Missouri Pacific and would abrogate the substantive portions of contractual agreements between MoPac and the respective unions if a rival union could represent an employee in a company level grievance or disciplinary proceeding that arose from the employee's conduct in a craft not subject to the collective bargaining agreement of the rival union. More importantly, if the BLE is allowed to represent switchmen in disciplinary proceedings at the company level, the BLE would be involved with the interpretation of the UTU agreement whenever the BLE represented switchmen; such a result is illogical because the resolution of such proceedings frequently depends upon what the carrier and signatory union intended when they negotiated the collective bargaining agreement.

(24) Affiant believes that if the BLE is allowed to represent switchmen in grievance and disciplinary proceedings on the property, it would foster the pursuit of frivolous cases by BLE in its effort to enhance the BLE's appeal to individuals that are not represented by the BLE. Such an approach would lead to increased difficulty for MoPac and would prevent MoPac from ensuring that claims or disciplinary proceedings are handled on consistent basis.

(25) The problems and administrative burdens that would develop if the BLE can represent switchmen at a company disciplinary proceeding would be aggravated at MoPac because the other fourteen unions at MoPac likewise may seek to represent switchmen and others, which would be extremely disruptive for the Railroad.

(26) Missouri Pacific believes that the representational or jurisdictional issues involved in this dispute should properly be considered by the National Mediation Board pursuant to the terms of the Railway Labor Act. BLE recently recognized the propriety of initially submitting representational or jurisdictional issues to the National Mediation Board, as evidenced by

BLE's application asserting a representation dispute with respect to switchmen employed by Missouri Pacific; a copy of the NMB's ruling on the BLE's application is attached as Exhibit 2 to this affidavit. In summary, the representational and jurisdictional disputes in this matter should be referred to the National Mediation Board, and any contract interpretation issues referred to the National Railroad Adjustment Board pursuant to Section 2 and Section 3, respectively, of the Railway Labor Act.

/s/ O. B. SAYERS
O. B. Sayers

Sworn To And Subscribed
Before Me This 3rd
Day Of December, 1984.

/s/ J. J. MARRA
J. J. Marra
Notary Public

My Commission expires July 18, 1988

J. J. MARRA - NOTARY PUBLIC
STATE OF MISSOURI, COMMISSIONED
WITHIN THE COUNTY OF ST. LOUIS.

APPENDIX D

UNITED STATES DISTRICT COURT
District of Massachusetts

PAUL G. LANDERS,

Plaintiff

v.

NATIONAL RAILROAD PASSENGER CORPORATION, and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Defendants

Memorandum
June 24, 1986

Plaintiff, a passenger engineer employed by defendant National Railroad Passenger Corporation ("Amtrak"), and a member of the United Transportation Union ("UTU"), alleges a violation of his rights under §§ 2 and 3 of the Railway Labor Act, 45 U.S.C. §§ 152, 153 ("RLA"), by defendants Amtrak and the Brotherhood of Locomotive Engineers ("BLE"). Plaintiff claims that his rights under the RLA were violated when he was not permitted to be represented by his own union, the UTU, at an internal company disciplinary hearing. A non-jury trial was held and, after all parties had completed their evidentiary offerings, oral argument was held on April 2, 1986. The parties having made their post-trial submissions, all of the parties' contentions are now before me for decision.

I.

As a threshold matter, the defendants contend that this court is without subject matter jurisdiction to hear plaintiff's claim. Defendants submit two bases for this contention.

First, defendants contend that plaintiff's claim raises only a "minor dispute" over which this court has no jurisdiction. Under the RLA, federal district courts have jurisdiction only over "major" disputes. 45 U.S.C. § 156. "Minor" disputes are not properly before a district court judge and must be settled by statutorily prescribed arbitration processes. 45 U.S.C. § 153. *Carbone* v. *Meserve,* 645 F.2d 96 (1st Cir. 1981); *Airline Stewards and Stewardesses Association* v. *Caribbean Atlantic Airlines,* 412 F.2d 289 (1st Cir. 1969). A major dispute "relates to the formation or modification of the collective agreement." *Carbone,* 645 F.2d at 98. A minor dispute "contemplates an existing agreement and relates 'to the meaning or proper application of a particular provision with reference to a specific situation or an omitted case,' " *Id.* (quoting *Elgin, J., & E. Ry.* v. *Burley,* 325 U.S. 711, 723 (1945)).

In this case plaintiff claims that the agreement reached between the BLE, the collective bargaining representative for Amtrak's passenger engineers, and Amtrak violates the RLA because it provides that the BLE shall be the exclusive representative of all Amtrak passenger engineers, whether or not they are members of the BLE, at internal company disciplinary hearings. The collective bargaining agreement at issue was entered into on October 26, 1982, by the BLE and Amtrak and became effective on January 1, 1983. Rule 21 of that agreement provides that at company disciplinary hearings and company appeal hearings, a passenger engineer may be represented by "his duly accredited representative." Rule 1(c) defines "duly accredited representative" as follows: "the General Chairman of the Brotherhood of Locomotive Engineers having jurisdiction or any elected officer of the Brotherhood of Locomotive Engineers designated by the General Chairman."

Defendants characterize plaintiff's claim as a dispute over who may properly be a "duly accredited representative." Because, defendants contend, the dispute is thus over the interpretation of a term in the agreement, it is a "minor" dispute.

This contention is without merit. Amtrak and the BLE interpret the agreement as providing that the BLE is to be the exclusive representative of passenger engineers in disciplinary hearings. Plaintiff does not dispute that this interpretation is the correct one. He concedes that under the agreement, the BLE is to be the exclusive representative. Indeed, it is this exclusivity that he is challenging. Plaintiff does not argue that he has a right under the existing agreement to have a different representative. Instead, he argues that under the existing agreement as both sides agree it should be interpreted, his rights under the RLA are violated. Because plaintiff is not challenging defendants' reading of the provision, but the permissibility of their having agreed to the provision, his challenge does not fall into the category of disputes over contract interpretation which are to be resolved only be administrative processes. As the court concluded in *Taylor* v. *Missouri Pacific Railroad Co.,* 614 F. Supp. 1320, 1322 (E.D. La. 1985), when faced with the identical issue, "Since the issue is one of validity, not interpretation, it is for judicial consideration. *See Felter* v. *Southern Pacific Co,* 359 U.S. 326, 327 n.3 (1959); *Order of Railway Conductors & Brakemen* v. *Switchmen's Union of North America,* 269 F.2d 726 (5th Cir. 1959)."

II.

Defendants contend also that this court is without subject matter jurisdiction because the dispute in this case represents a jurisdictional battle between two unions, the BLE and the UTU. In support of this contention, defendants rely principally on *General Committee* v. *Southern Pacific Co.,* 320 U.S. 338

(1943), in which the Supreme Court held that the federal courts had no jurisdiction to resolve a dispute between two unions over whether one of the two unions could, as the collective bargaining representative for a particular craft, agree with the carrier that it would be the exclusive representative in grievance hearings for employees in that craft, even if those employees were members of the other union. Although plaintiff in this case raises the same issue—the validity of an exclusive representation agreement—that was raised in *General Committee* v. *Southern Pacific Co.*, that case is not dispositive of the jurisdictional problem raised here.

In *General Committee* v. *Southern Pacific Co.*, the Supreme Court held that where one *union* challenged the validity of an exclusive representation agreement into which another union had entered, the federal courts had no jurisdiction. The Court held that under § 152, Ninth a challenge of this kind could only properly be made in proceedings before the National Mediation Board ("Mediation Board").

The Supreme Court expressly declined to decide, however, whether a similar challenge made by an individual employee would be justiciable: "Whether different considerations would be applicable in case an employee were asserting that the Act gave him the privilege of choosing his own representative for the prosecution of his claims is not before us." 320 U.S. at 344.

I conclude that this jurisdictional question, expressly left open by the Court in *General Committee* v. *Southern Pacific Co.*, should be resolved in favor of justiciability.

The Supreme Court has long made clear that the federal courts have a role in enforcing the commands of the Railway Labor Act. *See Virginian Railway Co.* v. *System Federation No. 40, et al.*, 300 U.S. 515 (1937); *McElroy* v. *Terminal Railroad Association of St. Louis*, 392 F.2d, 966, 968 (7th Cir. 1968), and cases cited therein. That role is limited considerably by the various provisions of the RLA that place certain kinds of disputes arising under the Act within the exclusive jurisdiction

of the National Railroad Adjustment Board ("NRAB") or the Mediation Board. This dispute, however, does not fall into any of the several categories of disputes that have been assigned to the administrative domain for resolution. It is not a "minor" dispute over which only the NRAB has jurisdiction, nor a jurisdictional contest between unions over which only the Mediation Board has jurisdiction. I conclude, therefore, that plaintiff's claim of rights under the RLA raises a dispute that this court may entertain. *See McElroy, supra* (claim that employee is entitled under RLA to be represented by his own union in grievance proceedings rather than the union that is the collective bargaining representative for his craft does not raise either a "minor" dispute over contract interpretation or a jurisdictional dispute between unions; the court thus has jurisdiction over the claim); *Taylor, supra* at 1322 (same); *Coar v. Metro-North Commuter Railroad Co.*, 618 F. Supp. 380, 381-82 (S.D.N.Y. 1985) (same).

III.

Defendants offer a third reason that this court should not hear plaintiff's claim. Defendants contend that because plaintiff did not exhaust his administative remedies, he is barred from bringing this action in federal court.

The events that gave rise to the instant suit are as follows: In February 1984 Amtrak filed disciplinary charges against Landers for failure to comply with certain operating and safety rules while on duty. A hearing was held on these charges at which, over his objection, the BLE represented plaintiff. After the hearing, plaintiff was assessed with a thirty-day suspension. Plaintiff served his suspension and did not appeal the hearing decision. On February 21, 1984, plaintiff commenced this suit.

Defendants contend that because plaintiff failed to appeal his claim that he had been wrongfully denied his right to have

the UTU represent him, he is barred from raising that claim here. In support of this contention, defendants cite a number of opinions by the NRAB—the administrative body to whom plaintiff could have appealed—in which the NRAB decided questions relating to employee's rights of representation at disciplinary hearings.

I conclude that plaintiff's failure to appeal is not a bar to this action for the same reason I concluded that the issue in this case is not a minor dispute. The issue here is purely one of statutory interpretation: whether the RLA prohibits the kind of exclusive representation clause included in the BLE-Amtrak agreement. Because the question is the validity of the contract, not its interpretation, it is for the court, not the administrative process, to resolve.

The NRAB decisions cited by defendants are for the most part in accordance with this distinction. Most of the decisions deal with the interpretation of a particular contract—they concern, for example, what the term "duly accredited representative" means as used in a particular contract. *E.g., Brotherhood of Railroad Signalmen* v. *The Long Island Rail Road Company,* Award No. 21237 (3rd Division Sept. 28, 1976). Although some of the decisions make reference to the requirements of the RLA, *e.g., Order of Railway Conductors* v. *Norfolk and Western Railway Company,* Award No. 16973 (1st Division, March 18, 1955), nothing in the Act requires that an aggrieved employee raise statutory claims with the NRAB rather than in a federal court. I conclude that the issues of statutory interpretation raised by plaintiff in this action are not the type of issues to which the administrative exhaustion requirements of the RLA apply. Plaintiff's failure to exhaust thus does not act as a bar to this action.

In conclusion, I reject defendants' arguments that this court should dismiss this case for want of subject matter jurisdiction or failure to exhaust administrative remedies. I thus turn to plaintiff's substantive contentions.

IV.

In support of his contention that under the RLA an employee has a right to be represented by his own union in company grievance hearings, plaintiff relies principally on three provisions of the Act. First, plaintiff points to § 152, Second which delineates the "general duties" of carriers and employees in all disputes. Section 152, Second reads,

> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Plaintiff contends that the language "representatives designated . . . by the employees thereof interested in the dispute" confers a right on the employee interested in a particular disciplinary dispute to designate his own representative. Although plaintiff's reading of § 152, Second is plausible, I conclude that it is not the correct one.

Section 152, Second is a general statement of the responsibilities of carriers and employees for resolving disputes. The section thus applies to the many different kinds of disputes that may arise either between a group of employees and the carrier or an individual employee and the carrier. Various other provisions of the Act delineate how a representative is to be designated for a particular purpose. For example, § 152, Fourth provides

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter.

Thus, the method for designating the representative for collective bargaining purposes is majority vote by those employees "interested" in the bargaining.

Another example is § 153, First (j) which provides that parties appearing before the NRAB in certain disputes "may be heard either in person, by counsel, or by other representatives, as they may respectively elect." An employee interested in a grievance hearing before the NRAB thus may designate any representative he or she chooses.

The circumstance that various provisions specify how representatives are to be chosen with respect to particular disputes suggests that the general language of § 152, Ninth does not create particular rights in this regard on behalf of "employees . . . interested in the dispute." I thus conclude that this section alone does not create the right asserted by plaintiff. In order to prevail he must point to some more particular support in the statute for his asserted right.

V.

Plaintiff relies also on § 152, Eleventh (c) which guarantees that each employee may belong to the union of his or her choice. That is, an employee is not required to belong to the union that represents his or her craft in collective bargaining with the carrier. Plaintiff argues that the right to be represented by his own union in disciplinary hearings before his employer is a necessary incident of his right to belong to that union. In support of this argument, plaintiff cites language from three cases in which an employee or employees challenged an exclusive representation agreement. *McElroy, supra, Coar, supra,* and *Taylor, supra.* In those cases the courts held that the right to representation by one's own union in grievance hearings followed "logically," "implicitly" and "clearly" from the right to membership in that union. *See respectively McElroy,* 392 F.2d at 972; *Coar,* 618 F. Supp. at 382; *Taylor,* 614 F. Supp. at 1324.

With all respect to these courts, I must disagree with their conclusion that the right of representation in internal company disciplinary proceedings necessarily flows from the right of membership.

The RLA accommodates a number of competing purposes. One purpose is to promote collective bargaining between members of a craft and the carrier by whom they are employed. In furtherance of that purpose, Congress provided that the union chosen by the majority of members of a particular craft employed by a carrier would represent all members of that craft in collective bargaining with that carrier. *See* 45 U.S.C. § 152, Sixth. But Congress also provided that, because of the peculiar nature of the railroad industry, including the frequent movement of employees among the different crafts, every member of a particular craft need not be required to belong to the union designated by the majority of the members of that craft. *See* 45 U.S.C. § 152, Eleventh (c). The RLA thus accommodates two sometimes conflicting interests—the interest in furthering collective bargaining for a craft as a whole and the interest in saving employees from the burden of frequent changes in union membership. Because the right to belong to the union of one's own choice arises in this special context of competing interests, that right may not automatically include subsidiary rights, such as the right of representation in company disciplinary hearings, that might otherwise be thought necessary and incidental.

Without question an employee has a strong interest in having his own union represent him in a disciplinary hearing. It is likely that he has chosen that union because it is the one in which he has most confidence, or the one with which he is most familiar. Disciplinary hearings are matters of great importance to an employee, and it is clear that he has an interest in being accompanied at that hearing by the union that he believes can provide him with the best representation.

The union that has signed the collective bargaining agreement, as well as its member and other non-member employees

within that craft, also have an interest, however. The courts and commentators have long recognized that the resolution of particular grievances and disciplinary actions will have a profound effect on the way a collective bargaining agreement is administered because those individual resolutions will become the precedents by which later disputes are decided. *See, e.g., Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965); Cox, *The Duty To Bargain Collectively During the Term of an Existing Agreement,* 63 Harv L. Rev. 1097, 1100 (1950) (in the context of the National Labor Relations Act, "Contract negotiations are the legislative process of collective bargaining; the day-to-day working out of plant problems is its administrative or judicial aspect .... To exclude the bargaining representative from the processing of grievances, or to admit a minority union, is also an unfair labor practice."). In *Republic Steel* v. *Maddox,* in which the National Labor Relations Act was the controlling statute, the Supreme Court wrote

> Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract.

379 U.S. at 653.

Because the competing interests of collective-bargaining-representative unions and of craft-members who are not members of that union must both be accommodated by the Act, I conclude that Section 152, Eleventh (c) cannot be read to include an automatic right of representation. Because the right to membership in a union does not alone guarantee the right to representation by that union, I conclude that plaintiff's claim of thi. latter right can succeed only if there exists some other more specific statutory provision creating that right.

VI.

Plaintiff relies finally on § 153, First (i), which reads.

> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Plaintiff contends that the "usual manner" for handling disputes includes the representation of each employee by his own union.

Defendants contend that, unlike the circumstances in *McElroy*, the "usual manner" of grievance resolution between the parties to this case does not include any such representation.

Although the language of the statute itself does not compel the conclusion that the term "usual manner" refers to the "usual manner in which, as a factual matter, a particular carrier and its employees have resolved their disputes," the parties on both sides assume that this is the proper definition. *McElroy* also uses the term in this way. Because this is a common sense reading of the term as used in this section and because no indication that any different meaning was intended has been brought to the court's attention, I conclude that the term "usual manner" should be understood as referring to the usual manner in which disputes have been resolved by a particular carrier and its employees.

I find that the usual manner of dispute resolution between Amtrak and its employees does not include the practice of representation of each employee by his own union.

Amtrak, as a relatively new carrier, did not begin employing passenger engineers directly until January 1, 1983. The collective bargaining agreement at issue in this case, including the provision for exclusive representation by the BLE of passenger engineers in company disciplinary hearings, has been in effect since that time. Under that agreement, the practice has consistently been to allow only the collective bargaining agent to act as an employee's representative. Although plaintiff has pointed to a small number of isolated incidents where that practice was not followed, I find that these exceptions are too rare even to approach establishing representation by an employee's own union as the "usual manner" of dispute resolution.

The fact that representation by an employee's own union is not the usual manner of dispute resolution between Amtrak and its passenger engineers distinguishes this case from *McElroy*. In that case a practice of representation by an employee's own union had developed, in part because employees "shuttled" back and forth between different crafts. That is, at times they worked in a craft for whom their own union was the bargaining representative and at other times in a craft for whom a different union was the bargaining representative.

In contrast, there is little or no shuttling between crafts by employees who work as passenger engineers for Amtrak. Although Amtrak passenger engineers have a semi-annual option to transfer to Conrail as passenger engineers, they would continue to be represented by the BLE in this position. Only a relatively small number of employees have exercised this option. Passenger engineers who do exercise this option do not shuttle between two crafts represented by two different unions but between two crafts represented by the same union.

Once an Amtrak engineer has transferred back to Conrail, he could under certain circumstances move into the lower ranking position of fireman. Fremen at Conrail are represented by the UTU. Thus, it is possible that plaintiff could in some

circumstances work in a craft represented by the UTU. The likelihood of such a development, under the evidence before the court, is so remote that it cannot be said that a true "shuttling" situation exists as that term is used in the case law.

Moreover, this possibility of transfer between crafts at Amtrak has not resulted in a practice of representation by an employee's own union. By contrast, in *McElroy* the court determined that there had long been a practice whereby employees who shuttled between crafts could be represented by their own union even where the grievance arose while working in the craft for which their union was not the bargaining representative. It was the deviation from this usual manner that occurred when one union signed an exclusive representation agreement of which plaintiffs complained in *McElroy*. The Seventh Circuit based its ruling that the exclusive representation agreement was impermissible largely on the facts of that case: the practice of shuttling between crafts and the long-standing practice of representation by an employee's own union. Indeed, in *McElroy* the Seventh Circuit declined to overrule *Broady* v. *Illinois Central Railroad Co.*, 191 F.2d 73 (7th Cir. 1951), *cert. denied*, 342 U.S. 897, in which on different facts it had refused to invalidate an exclusive representation agreement: "[That case] did not involve the unique situation here where employees shuttle back and forth between their crafts." *McElroy*, 392 F.2d at 971.

Thus, I conclude that plaintiff cannot prevail on his argument that he has a right to be represented by his own union because that is the usual manner in which disputes have been resolved by Amtrak and its passenger engineers.

VII.

In summary I conclude that plaintiff has pointed to nothing in the statute or the facts of this case that establishes a right to use the UTU as his representative in internal company disciplinary hearings. In addition to this absence of any affirma-

tive source of this asserted right, there is another provision that supports the conclusion that the statute did not create such a right. In contrast with § 153, First (i), which provides that disciplinary and grievance hearings at the company level will be handled in the "usual manner," § 153, First (j) provides that for those disputes that are appealed from the company level to the NRAB,

> (j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

It is apparent from § 153, First (j) that Congress was quite able to specify what rights of representation a party to a dispute might have. Congress' failure to make any specific provision for rights of representation at the company level in the section directly preceding § 153, First (j) which makes explicit provision for such rights at the NRAB level suggests strongly that Congress did not mean to establish such rights for the first level of dispute resolution. *See Butler* v. *Thompson,* 192 F.2d 831, 833 (8th Cir. 1951) (rejecting a claim that despite the contrary language of the collective bargaining agreement, he should be allowed to have his own union represent him in grievance hearings and emphasizing the distinction between § 153, First (i) and § 153 First (j): the former provides that the collective bargaining contract governs proceedings at the company level; the latter provides that the statute itself governs proceedings at the NRAB level).

For all of the reasons stated above I conclude that plaintiff cannot prevail on his claim that the Amtrak-BLE agreement is invalid under the RLA because it does not permit him to be represented by his own union in internal company disciplinary hearings.

/s/ ROBERT E. KEETON
Robert E. Keeton
United States District Judge

UNITED STATES DISTRICT COURT
District of Massachusetts

PAUL G. LANDERS,

Plaintiff

v.

NATIONAL RAILROAD PASSENGER CORPORATION, AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Defendants

ORDER
June 24, 1986

For the reasons stated in the Memorandum of this date, it is ORDERED:

The collective bargaining agreement signed by defendants Amtrak and BLE on October 26, 1982, insofar as it prohibits plaintiff from being represented by his own union, the UTU, at company disciplinary hearings, does not violate the RLA.

Judgment for defendants, with costs.

/s/ ROBERT E. KEETON
Robert E. Keeton
United States District Judge

(2) (2)

Nos. 86-642 and 86-669

In the Supreme Court of the United States

October Term, 1986

UNITED TRANSPORTATION UNION,
Petitioner,

vs.

W. G. TAYLOR, *et al.*,
Respondents.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

W. G. TAYLOR, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313
Counsel for Respondents

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

47pp

QUESTIONS PRESENTED

1. Do the federal courts have subject matter jurisdiction to determine whether a provision in a collective bargaining agreement prohibiting a railroad operating employee from selecting the union to which he belongs to represent him in processing his claims and grievances and to appear with him at investigative hearings is invalid under the Railway Labor Act, 45 U.S.C. §§151 *et seq.*?

2. Whether the Railway Labor Act renders unenforceable exclusive grievance representation provisions which prevent a member of a union that meets the standards of the union shop requirements under an agreement entered into pursuant to 45 U.S.C. §152, Eleventh (c), from selecting his union, rather than the collective bargaining representative of the craft in which he is working, to represent him at investigations and in handling his grievances?

PARTIES INVOLVED

Petitioners are Missouri Pacific Railroad Company and United Transportation Union, the defendants-appellants below. Respondents are W. G. Taylor, K. P. Brockhoeft, A. J. Ruiz, Wayne A. Sepcich and Brotherhood of Locomotive Engineers.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Although the statements contained in the petitions of the Missouri Pacific Railroad Company ("MoPac") and United Transportation Union ("UTU") are essentially correct insofar as they draw from the opinions below, it needs

to be noted that MoPac has been in existence since 1917 *Moody's Transportation Manual*, p. 162 (1985). During that period, the petitioner UTU, and its predecessors prior to 1969, have been the collective bargaining representatives for the crafts of firemen (helpers), conductors, trainmen and switchmen.[1] Respondent Brotherhood of Locomotive Engineers ("BLE") has represented the craft of locomotive engineers. In fact, BLE is the collective bargaining representative for the craft of locomotive engineers on almost all of the nation's railroads and is a national railway labor organization which admits to membership employees in engine, train, yard and hostler service within the meaning of Section 2, Eleventh (c) of the Railway Labor Act ("RLA"), 45 U.S.C. §152, Eleventh (c).

As such, BLE is qualified to appoint two labor members on the First Division of the National Railroad Adjustment Board pursuant to Section 3, First of the RLA. UTU also opens its membership to employees in the crafts of engineers, firemen (including hostlers),[2] conductors,

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1. Railroad employees are organized on a craft basis. *See Switchmen's Union v. NMB*, 320 U.S. 297 (1943); 45 U.S.C. §152, Ninth. "Operating employees" are those employees involved in the movement of the locomotive units and their train consist, and comprise five crafts that are further called "engine service" employees (engineers and/or firemen) and "train service" employees (conductors, trainmen and switchmen).

2. On October 31, 1985, UTU entered into a national agreement with the National Railway Labor Conference, which is the negotiating arm of the nation's railroads, to eliminate the craft of firemen and eventually to replace them as the source of supply for engineers with train service employees. The preface of Article XIII of that agreement reads:

> "The craft or class of firemen (helpers) shall be eliminated through attrition except to the extent necessary to provide the source of supply for engineers and for designated passenger firemen, hostler and hostler helper positions. Trainmen shall become the source of supply for these positions as hereinafter provided."

(Continued on following page)

trainmen and switchmen. Therefore, it likewise is qualified to appoint the two other labor members on the First Division. The First Division has jurisdiction to hear and resolve all grievances and claims of railroad employees in the operating crafts—the crafts exclusively represented by BLE and UTU on the nation's railroads.

Moreover, membership in either BLE or UTU by an operating employee statutorily fulfills any union shop requirement negotiated by BLE or UTU as representative of any operating craft, even though the other union is not a craft representative on the employing rail carrier. *Birkholz v. Dirks,* 391 F.2d 289 (7th Cir. 1968); *O'Connell v. Erie Lackawanna R.R.,* 391 F.2d 156 (2d Cir. 1968). *See also,* 45 U.S.C. §152, Eleventh. As Section 2 of the UTU-MoPac Union Shop Agreement for the craft of switchmen provides, the requirements of membership in UTU, in the particular instance, shall be satisfied "if said employee should hold or acquire membership in any one of the labor organizations national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in any of said services." (Affidavit of M. L. Royal, ¶3, which is attached as Appendix A, A2-A3). And UTU agrees that trainmen and engineers satisfy their union shop agreements by belonging to either UTU or BLE (Exhibit C to Affidavit of W. J. Wanke, which is attached as Appendix B, A13-A15).

BLE has never objected to UTU representing its members in the processing of any claims arising under the BLE collective bargaining agreements on MoPac through

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Footnote continued—

Thus, if the UTU-MoPac reading of the RLA were accepted, it would have the absurd result of sanctioning UTU to represent all operating employees in the grievance-arbitration machinery, and limit BLE to its locomotive engineer members.

the grievance machinery specified in those contracts. And until this case, UTU had never objected to BLE representing its members in the processing of any claim arising under a UTU labor contract, notwithstanding the exclusive representation language therein.

W. G. Taylor and the three other individual respondents are employed by MoPac at its Avondale, Louisiana Yard. They are switchmen and also are locomotive engineers or hold promotion and work rights in that craft. As switchmen on MoPac they for years have had first preference to transfer into the engine service crafts and ultimately promotion into and seniority within the engineers' craft (See also fn. 2, *supra*). Thus, when Taylor and other switchmen working as engineers are unable to work in the latter craft, they flow back as firemen or switchmen until their seniority again permits them to work as engineers (Royal Affidavit, ¶2, Appendix A, A2). All of the individual respondents are members of BLE (*Id.* ¶6, App. A, A4).

Shortly after January 1, 1984, the respondents Taylor, Ruiz and Sepcich were charged with misconduct. They sought to have BLE's local chairman act as their representative at the investigative hearing scheduled for February 8, 1984, but MoPac refused to permit them to be represented by anyone other than an officer of UTU. The investigation was held without the employees having their requested representation (*Id.* ¶8, App. A, A4-A5).

On other occasions, other members of BLE, including the respondents sought BLE representation regarding their claims and grievances. In each instance, MoPac refused to allow BLE to handle its members' claims and to submit those matters for arbitration provided by public law boards

pursuant to Section 3, Second of the RLA, 45 U.S.C. §153, Second[3] (*Id.* ¶10, App. A, A5).

In support of its denial of each employee's request for BLE assistance, MoPac relied upon the provisions of its bargaining agreement with UTU, including Articles 18 and 23, which limit and restrict appearances at investigations and in the handling of claims and grievances to the "duly accredited representative of the UTU." (MoPac Pet. App. B at 22a-24a).

The complaint was filed on February 6, 1984, to enforce the rights of the employees to have their disciplinary cases and grievances handled by BLE as their selected representative and for BLE to handle their disciplinary matters and any other claims at arbitration before special boards of adjustment (sometimes called "Public Law Boards") created in accordance with Section 3, Second of the RLA, 45 U.S.C. §153, Second.

MoPac moved to dismiss for lack of subject matter jurisdiction, which was opposed by both UTU and the respondents. The motion was denied on August 22, 1984. Both petitioner UTU and respondents filed motions for summary judgment, and MoPac opposed both on the same jurisdictional grounds. However, on March 20, 1985, the district court granted summary judgment for the employees and BLE (MoPac Pet. App. B, 10a-26a).

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3. Section 3, Second, in pertinent part, provides that if "written request is made upon any individual carrier by the *representative of any craft or class of employees of such carrier* for the establishment of a special board of adjustment * * * the carrier or representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made." (Emphasis supplied). BLE meets the standard set out in the italicized language.

The district court rejected MoPac's jurisdictional objections, because the case did not present a dispute regarding the jurisdiction of competing unions as to which the National Mediation Board has exclusive jurisdiction under Section 2, Ninth of the RLA[4] in that "this case presents no issue about UTU's authority to make agreements with MOPAC relating to the working conditions, rules, and pay of MOPAC switchmen." (MoPac Pet. App. B at 13a). In addition, the trial court held that the matter did not involve a "minor dispute" regarding the interpretation or application of a collective bargaining agreement provision since "the parties agree that the challenged provisions of the UTU/MOPAC agreements purport to create an exclusive right of UTU to represent switchmen at all MoPac company level proceedings." (*Id.*)

In holding that it had jurisdiction, the district court said:

> "Since the issue is one of validity, not interpretation, it is for judicial consideration. *See Felter v. Southern Pacific Co.*, 359 U.S. 326, 327 n.3, 79 S. Ct. 847, 850 n.3 (1959); *Order of Railway Conductors & Brakemen v. Switchmen's Union of North America*, 269 F.2d 726 (5th Cir. 1959). Nothing in the RLA restricts the Court's jurisdiction to determine whether the exclusive representation provisions of the UTU/

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4. Section 2, Ninth, 45 U.S.C. §152, Ninth, authorizes the Mediation Board "to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." In other words, this provision gives the NMB exclusive jurisdiction to investigate and certify the craft representative for purposes of negotiating rates of pay, rules, and working conditions.

MOPAC agreements are valid." (MoPac Pet. App. B, 13a-14a).

Following the lead case in this area, *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969), the district court ruled as follows on the merits:

> "Reading the language of the Act 'not in a vacuum, but in the light of the policies [it] was intended to serve,' *Pennsylvania R.R. Co. v. Rychlik*, 352 U.S. 480, 488, 77 S. Ct. 421, 425 (1957), we conclude that under the Act the individual plaintiffs are entitled to designate their union, BLE, to represent them in company level proceedings notwithstanding the UTU/MOPAC agreements to the contrary. We hold that the Act renders null and unenforceable the exclusive representation provisions of the UTU/MOPAC agreements insofar as they prevent a member of a railway union from selecting his own union rather than the bargaining representative union of the craft in which he is working to assist him at company level proceedings." (*Id.*, at 15a).

Judgment was eventually entered for the employees on August 8, 1985, after the claim for damages was waived (MoPac Pet. App. A, 3a). On appeal, the United States Court of Appeals for the Fifth Circuit affirmed (MoPac Pet. App. A at 1a-9a).

Like the district court, the Fifth Circuit held that neither the Adjustment Board nor the NMB had jurisdiction, for "the pertinent contractual provisions, reprinted in 614 F. Supp. at 1325-26, are clear and unambiguous and require no interpretation," (MoPac Pet. App. A, 4a) and there was no dispute "to implicate UTU's bargaining

position" and, therefore, to create "a representation dispute within the NMB's exclusive jurisdiction." Rather the Court of Appeals said that the issue specifically was "[w]hether a provision of a collective bargaining agreement is valid," which is "classic grist for the judicial mill." (*Id.* at 5a).

After looking at the language of the RLA, its goals and pertinent congressional testimony and after noting its decision accords "with the holdings or leanings of our colleagues in the Seventh, Eighth, and Tenth Circuits," the Fifth Circuit affirmed and said:

> "The individual, in such an instance [particular disciplinary or grievance hearing], would have a vital interest; that individual is the employee 'interested in the dispute.' The individual should be permitted to select his or her representative. Only in that manner would the heralded right to free selection of union membership be accorded the status and dignity explicit and implicit in the relevant statutes." (MoPac Pet. App. A, 9a).

REASONS FOR DENYING THE WRIT

This case involves no question that is significant for review by this Court. Clearly, Section 2, Second, Third and Sixth and Section 3, First (j) of the RLA grant operating employees the right to choose the union in which they hold membership to act in their behalf in investigation hearings and in processing their claims and grievances. As held by the Seventh Circuit in *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966, 969 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969), the RLA "guarantees an individual employee the right to

prosecute his grievance through any representative he may designate."

The legislative history of the RLA shows that employees without question have always had the right to be represented in grievance matters by the union to which they belong. *See Hearings Before House Committee on Interstate and Foreign Commerce on the Railway Labor Act*, H.R. 7650 (73rd Cong., 2d Sess.) at 44,89. Moreover, this Court has held that an employee's claims or grievances are his own to be handled independently by him or through the representative of his choosing, and cannot be interfered with by the carrier and/or the bargaining representative for the craft. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd on reh.*, 327 U.S. 661 (1946) ("*E.,J.& E.* case").

Following this Court's opinion in the *E.,J.& E.* case, then Attorney General Tom C. Clark entered an opinion that the RLA guarantees the right of the railroad employee to prosecute his grievance personally or through any representative he may designate, including a minority union. 40 *Op. Att'y Gen.* 494, at 495 (1946). *See also McElroy v. Terminal R.R. Ass'n of St. Louis, supra; General Committee v. Southern Pacific Co.*, 132 F.2d 194, 201 (9th Cir. 1942), *reversed on other grounds*, 320 U.S. 338 (1943); *Douds v. Local 1250, Retail, Wholesale & Department Store Union*, 173 F.2d 764 (2d Cir. 1949).

The doctrine of individual choice in grievance handling by railroad operating employees is further substantiated by Section 2, Eleventh (c) of the RLA, which permits all operating employees to satisfy the union shop requirements of any compulsory union membership agreement by membership in either BLE or UTU. *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480 (1957); *O'Connell v.*

Erie Lackawanna R.R., 391 F.2d 156 (2d Cir. 1968); *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968). In addition, the Eighth Circuit and the Tenth Circuit, in *United Transportation Union v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977) and *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western R.R.*, 411 F.2d 1115 (10th Cir. 1969), concluded that UTU, in those cases the minority union, could require the employing railroad to set up a Public Law Board to handle its members' grievances and discipline matters, even though the claims arose in a craft for which the UTU was not bargaining representative and the employees involved had no likelihood of ever working in a UTU represented craft.

Also, in respect to MoPac's assertion relative to jurisdiction, there is no significant issue which needs the attention of this Court. As a question of contract validity, the issue is solely one for judicial consideration, not arbitration by the National Railroad Adjustment Board or by a Public Law Board under Section 3 of the RLA. *See, e.g., Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952); *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959). Nor does the dispute constitute "a representation dispute within the NMB's exclusive jurisdiction." (MoPac Pet. App. A, 5a). Not only does everyone concede that UTU is the bargaining representative for switchmen with authority to negotiate the labor contract for the switchmen craft as a whole so that nothing involved in this case can purport to be a jurisdictional or representational dispute, but the National Mediation Board has no adjudicating authority or the power to fashion relief in a case of this nature, nor has that Board been given the function of interpreting the RLA. *See Detroit & T. S. L. R.R. v. United Transportation Union*, 396 U.S. 142, 158-159 (1969).

Therefore, contrary to petitioners' assertions, the decision below is not in conflict with any decision of the other courts of appeals and presents no question under the RLA which merits this Court's review. Moreover, the decision is consistent with the holdings of this Court and the applicable provisions of the RLA and their legislative history.

I. THE RULING BELOW RELATIVE TO SUBJECT MATTER JURISDICTION WAS NOT ERRONEOUS AND DOES NOT PRESENT A SIGNIFICANT ISSUE.

It is well-settled that the statutory commands under the RLA are not mere exhortations but are enforceable in the courts. This doctrine was first announced in *Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548 (1929), which upheld the issuance of an injunction prohibiting a carrier from interfering with its employees' rights to organize and from promoting a company union. Later, in *Virginian Ry. v. System Fed. No. 40,* 300 U.S. 515 (1937), the Court detailed the powers of the federal courts to fashion equitable relief to enforce the RLA's statutory commands in upholding the issuance of relief against a carrier that refused to bargain with the certified craft representative and had attempted to defeat its majority status. In accordance with those decisions, respondents requested enforcement of rights under Sections 2 and 3 of the RLA, and the Courts below fashioned equitable relief enforcing those commands.

Further, the question of the legality of the UTU-MoPac exclusive representation provision was properly for the courts to decide and is not one for Adjustment Board consideration. This Court has decided that contract validity questions are for the courts and not for the Adjustment

Board. *Brotherhood of R.R. Trainmen v. Howard,* 343 U.S. 768, 774 (1952); *Felter v. Southern Pacific Co.,* 359 U.S. 326, at 327 n.3 (1959). *See also Order of Ry. Conductors & Brakemen v. Switchmen's Union,* 269 F.2d 726 at 729 (5th Cir. 1959) ("the case poses a genuine issue as to validity, not interpretation, so that on these and other authorities, it is one for judicial consideration.") Also, where the Adjustment Board cannot provide the relief sought, as here, the Court has decided that the need for judicial intervention is itself sufficient to confer jurisdiction on the courts, even if contract interpretation questions were involved, which we do not suggest remotely exists in this case. *See Glover v. St. Louis - S.F. R.R.,* 393 U.S. 324, 329 (1969).

Finally, the courts below correctly rejected the contention of MoPac that the dispute is a jurisdictional one within the jurisdiction of the NMB. As a reading of Section 2, Ninth of the RLA, 45 U.S.C. §152, Ninth, reveals, the NMB has jurisdiction only to determine through an election the certified representative of a craft or class of employees. That section of the Act and the NMB have nothing whatsoever to do with the selection of the individual's grievor or his choice of the person or the union that he wishes to represent him in the grievance-arbitration procedures. Respondents throughout the proceeding have conceded that UTU is the bargaining representative for the craft of switchmen on MoPac. They also concede that neither they nor the grievance handler chosen by them can negotiate the rates of pay, rules, or working conditions for the switchmen craft as a whole, and they are not seeking to infringe upon UTU's authority in that respect. There is simply nothing involved in this case that can be perceived to be a jurisdictional or representational dispute. Accordingly, the principle that the NMB has ex-

clusive jurisdiction to resolve representational disputes, which the Court enunciated in the 1943 Trilogy of *Switchmen's Union v. NMB,* 320 U.S. 297; *General Committee v. Missouri-Kansas-Texas R.R.,* 320 U.S. 323; and *General Committee v. Southern Pacific Co.,* 320 U.S. 338, is inapplicable. Simply put, as this Court said in *Detroit & T.S. R.R. v. United Transportation Union,* 396 U.S. 142, at 158 (1969), "the Mediation Board has no adjudicating authority. . .," nor could it grant any relief in this situation.

II. THE DECISION BELOW CONFORMS WITH THE APPLICABLE STATUTORY LANGUAGE AND ITS LEGISLATIVE HISTORY

A. The RLA Provides That An Employee May Select His Own Representative For Handling His Claims.

The RLA provision applicable to company-level proceedings is Section 2, Second of the RLA, 45 U.S.C. §152, Second, which provides that claims and grievances shall be considered "in conference between *representatives designated* and authorized so to confer, respectively, by the carrier or carriers and *by the employees thereof interested in the dispute.*" (Emphasis supplied). As stated by the Seventh Circuit in *McElroy v. Terminal R.R. Ass'n of St. Louis,* 392 F.2d 966, at 969 (7th Cir. 1968), *cert. denied,* 393 U.S. 813 (1969), "on its face, this provision guarantees an individual employee the right to prosecute his grievance through any representative he may designate."

If this were not sufficient to establish the point, Section 2, Third, 45 U.S.C. §152, Third, permits employees to designate representatives without interference from the carrier, and establishes that the representatives of

those employees need not be employees of the carrier. Section 2, Sixth, 45 U.S.C. §152, Sixth, permits individual employees or their fellow employee representatives to confer with management during working hours and without loss of pay. And in Section 3, First (j), Congress acknowledged the employee's right to choose any representative to act in his behalf in presenting "minor disputes," *i.e.*, disputes which concern grievances and contract interpretation questions before the National Railroad Adjustment Board or Public Law Boards.

Petitioners attempt to read the provisions of the RLA to grant the recognized or designated bargaining representative exclusivity in all matters, whether "major" or "minor." However, if one reads Sections 2 and 3 completely, the draftsmen of the RLA knew when and how to refer to the representative of the craft determined by the majority. That terminology is used only in Section 2, Fourth in reference to collective bargaining and in Section 2, Ninth relative to the representation elections held by the NMB to determine the bargaining representative for the craft. In all provisions having reference to individual rights or the handling of minor disputes, the RLA refers to "representatives designated by the employees interested in the dispute."

Relying upon the purposes of the RLA, particularly the freedom of association specified in 45 U.S.C. §151a, the Court of Appeals appropriately concluded:

> "The district court's decision manifestly is consistent with the stated goals of the RLA. Only specific language of the RLA would warrant rejecting the trial court's findings and conclusion. We have been cited to no such language, and find none" (MoPac Pet. App. A, 8a).

B. The Legislative History Of The RLA Shows That Employees Have Always Had The Right To Be Represented By Minority Unions In Grievance Matters.

In the hearings on the RLA before the House Committee on Interstate and Foreign Commerce, Commissioner Joseph B. Eastman, who had control of the nation's railroads for the federal government, was asked whether an individual or a group of individuals, not belonging to the craft representative, could present their grievances directly to the management. He responded:

> "[T]he old Railroad Labor Board . . . covered that point in the following language. I take this from the opinion of the Supreme Court in *Pennsylvania Federation v. Pennsylvania Railroad Company* (267 U.S. 203), in which this rule laid down by the board is quoted:
>
> 'The majority of any craft or class shall have the right to determine which organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all members of such craft or class. *No such agreement shall infringe, however, upon the right of employees not members of the organizations representing the majority to present grievances either in person or by representatives of their own choice.*'" *Hearings Before House Committee on Interstate and Foreign Commerce on the Railway Labor Act* (73rd Cong., 2d. Sess.), pp. 44. (Emphasis supplied).

In contravention of the exclusivity argument raised by petitioners, Commissioner Eastman stated:

> ". . . When it comes to collective bargaining in the matter of wages and working conditions, it seems to me plain that a company ought not be compelled to deal with more than one organization. It ought not to have to make bargains with two or three different organizations. *But when it comes to the presentation of grievances, that is a different matter, and certainly an individual employee ought not be stopped in any way from taking his grievance up directly with management, and I think that ought to apply to any other group of employees.*" *Id.* (Emphasis supplied).

George Harrison, Chairman of the Railway Labor Executives' Association and President of the Brotherhood of Railway Clerks, also testified that the majority representation features of the RLA were not intended to, and did not prevent individuals involved in grievances "from having representatives to handle their grievances that are not representatives of the majority." *Id.*, 89. In the same vein, he stated that the language contained in Section 3, First (j) applies to "the balance of the act in connection with grievances . . . just as it reads, where the individual may in person or by counsel of his own choosing of [sic] other representative, prosecute his grievances." *Id.*

In sum, the authors of the RLA intended that individual employees, like the individual respondents, would be able to use a minority union to process their grievances, and the language of the Act expresses that intent.

III. THERE IS NO CONFLICT WITH THE HOLDINGS OF THIS COURT OR THE DECISIONS OF THE OTHER CIRCUITS

In *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd on reh.*, 327 U.S. 661 (1946), the Court determined

that individual employees have the right to present their grievances to the National Railroad Adjustment Board and that the craft representative could not settle or withdraw them without the employee's consent. Finding the employee's grievances and claims are his own, the Court therefore held that "the individual employee's rights cannot be nullified merely by agreement between the carrier and the union." The Court said that these "are statutory rights which [the employee] may exercise independently or authorize the union to exercise in his behalf." 325 U.S. at 740 n.39.

On September 20, 1946, then Attorney General Tom C. Clark advised the President, in response to an inquiry from the National Mediation Board, that the *E.,J.& E.* case stressed that the RLA "obviously contemplates that an employee may personally present his own grievance to the management" and, thereby, the RLA "guarantees to the individual employee the right to prosecute his grievance personally or through any representative he may designate." 40 *Op. Att'y Gen.* 494, at 495 (1946). Justice Clark in summarizing his conclusions, said:

> "The agreement, however, under the decision of the Supreme Court in the *Elgin* case, cannot legally preclude an aggrieved employee from also negotiating with the carrier, personally or through an individually chosen representative, for the settlement of his grievance. *He may designate as his representative the union holding the contract or any other union or person otherwise qualified to act. He may negotiate, personally or by representative, whether or not the collective representative determines to pursue this matter.* And the settlement of the grievance, to be binding on the individual employees, must have been

authorized by him." (*Id.*, 499-500). (Emphasis supplied).

The various courts of appeals have uniformly ruled that a railroad employee can choose his own representative for processing his claims and grievances. In so ruling, the Ninth Circuit, rejecting the argument that only the bargaining representative for the craft could handle claims or grievances arising out of the collective bargaining agreement for that craft, said in response to a like argument of petitioner UTU that "[i]t is only with reference to craft organization and collective bargaining, that is, craft action, that a union chosen as a representative must be chosen by the majority." *General Committee v. Southern Pacific Co.*, 132 F.2d 194, 199 (9th Cir. 1942), *reversed on other grounds*, 320 U.S. 338 (1943). Based upon similar reasoning, the Fifth Circuit concluded in *Estes v. Union Terminal Co.*, 89 F.2d 768 (5th Cir. 1937), that the federal courts have jurisdiction to insure that a railroad employee receives notice of an arbitration proceeding, the award of which may affect his employment status, in order to permit the employee to choose his own representative in prosecuting his interests. More recently, the Sixth Circuit reached a similar result in *Meeks v. Illinois Central Gulf R.R.*, 738 F.2d 751 (6th Cir. 1984).

Any doubt about the issue in the railroad industry would seem to have been fully answered by the decision of the Seventh Circuit in *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969). In that case, one of UTU's predecessors found the shoe to be on the other foot. BLE had made an explicit agreement with the railroad that it alone would be the union representative in contract enforcement under the BLE contract for engineers. As

here, the railroad refused to allow UTU's predecessor to handle grievances of engineer employees in enforcement of the engineers' contract, and to appear for those persons at investigative hearings. The Seventh Circuit struck down the exclusive representation provisions contained in the BLE agreement as being in violation of the rights afforded the individual employees under Sections 2 and 3 of the RLA.

The Seventh Circuit rejected its decision in *Broady v. Illinois Central R.R.*, 191 F.2d 73 (7th Cir. 1951) and the decision of the Eighth Circuit in *Butler v. Thompson*, 192 F.2d 831 (8th Cir. 1951), along with several others. Petitioners suggest that the named decisions establish a conflict with the Seventh Circuit's decision in *McElroy*. However, the Seventh Circuit appropriately found those cases to be inapposite or not applicable to operating employees. Factually, those cases did not involve employees who have promotion and work rights in multiple crafts, employees who may satisfy their union shop requirements by membership in a "minority" union, unions covered by Section 2, Eleventh (c) of the RLA, and unions qualified to represent employees in any craft or class of employees subject to the jurisdiction of the First Division of the National Railroad Adjustment Board. Rather those cases involved employees outside the coverage of Section 2, Eleventh (c) who did not belong to the "recognized unions," and who, in most instances, were seeking to set aside unfavorable grievance-arbitration decisions, after entry thereof, by challenging the procedures through which they were reached. In addition, in *Broady v. Illinois Central R.R., supra*, the Seventh Circuit was never apprised of the passage of Section 2, Eleventh of the RLA or of the effect of this Court's decision in the *E.,J.& E.* case.

Petitioners also attempt to portray a conflict in the lower courts on this issue by comparing *Coar v. Metro-North Commuter R.R.*, 618 F. Supp. 380 (S.D. N.Y. 1985), which held that railroad employees have a choice of representation at company-level proceedings, with *Landers v. Nat'l Railroad Passenger Corp.*, ... F. Supp. ..... (D. Mass. 1986). (See UTU Pet. App. D.) The district court in *Coar* ruled in the same manner that the trial court in this case did and basically adopted the opinion of the district court below with additional emphasis upon quotations from the legislative history of the 1934 RLA in which the draftsmen testified that the grievants may have "representatives to handle their grievances that are not representatives of the majority." *Coar v. Metro-North Commuter R.R., supra,* 618 F. Supp. at 383. The district court in *Landers,* however, had before it a much different case from that at bar. And the court relied upon the severe factual distinctions in concluding that "plaintiff cannot prevail on his argument that he has a right to be represented by his own union because that is the usual manner in which disputes have been resolved by Amtrak and its passenger engineers." (UTU Pet. App. D, 4-b). In *Landers,* the court relied upon the facts that Amtrak is a relatively new passenger carrier; that it did not begin employing passenger engineers until January 6, 1983; that the exclusive representation rule has been in effect from the start-up date; that the practice under that agreement "has consistently been to allow only the collective bargaining agent to act as an employee's representative;" that "representation by an employee's own union is not the usual manner of dispute resolution between Amtrak and its passenger engineers;" and that any shuttling between crafts by Amtrak locomotive engineers is "not shuttl[ing] between two crafts represented by two

different unions but between two crafts represented by the same union." (UTU Pet. App. D, 4-1).

Petitioners also rely upon the Fifth Circuit's decision in *Hughes Tool Co. v. NLB*, 147 F.2d 69 (5th Cir. 1945), the philosophy of the NLRB, and the expressions of several legal commentators as to the application of the National Labor Relations Act, 29 U.S.C. §§141 *et seq.* None of those references dealt with a reading of the RLA. This Court has frequently emphasized that parallels between the two Acts are precarious at best and, in most instances, are not appropriate. *Chicago & N. W. R.R. v. United Transportation Union*, 402 U.S. 570, at 579 n.11 (1971).

The Court in *Hughes Tool* did, in fact, find that the NLRB correctly held that grievance handling is not collective bargaining for the whole unit, which is restricted to the collective bargaining agent. 147 F.2d *supra*, at 72. The Fifth Circuit also held that individuals and groups of employees could fully prosecute their grievances through all stages and appeals. However, it refused to extend the employee's choice to a rival union, because in its judgment, Section 9(a) of the NLRA, 29 U.S.C. §159(a), did not intend that a rival union would be able to present grievances. The basis for this view was the fact that when the proviso was before Congress, a proposal to add the words "through repesentatives of their own choosing" was rejected. *But see Douds v. Local 1250, Retail, Wholesale & Department Store Union*, 173 F.2d 764 (2d Cir. 1949). The differing legislative history and language of the RLA, however, allow employees to designate a minority union to represent them in grievance and claims handling.

The union membership choice cases under the RLA further establish the consistency of the decisions below

with the general principles applicable to railroad operating employees. What point would there be in the broad protection for BLE membership provided by Section 2, Eleventh (c), if the most critical benefit of membership, grievance representation, can be wiped out by agreements between UTU and MoPac? Surely the membership protection of Section 2, Eleventh (c) must be a meaningful one, not subject to obliteration by removal of the rights of membership, rights long accepted in the industry and known to Congress when Section 2, Eleventh (c) was enacted in 1951. The history of this legislation and the membership protections therein are well chronicled in several cases. *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480 (1957); *O'Connell v. Erie Lackawanna R.R.*, 391 F.2d 156 (2d Cir. 1968).

And Section 3, Second of the RLA, 45 U.S.C. §153, Second, which sets forth the Public Law Board arbitration procedures provided for by the 1966 amendments to the RLA, has also been read to permit a minority union (UTU in both cases) to handle contract grievances for its members employed in a craft represented by BLE. In ruling that the minority union could take its members' grievances to a public law board, the Eighth Circuit has stated:

> "In disputes arising out of collective bargaining agreements, other than merger protective agreements, an employee not only has a right to be represented by the union of his choice, but also has a right to have his union representative sit on the arbitration panel deciding the case. The employee has the right, even though the contract being construed was negotiated by a rival union and even though precedents established by the rival union and the railroad are to be followed." *United Transportation Union v. Burlington Northern, Inc.*, 563 F.2d 1279, at 1284 (8th Cir. 1977).

A similar conclusion was reached by the Tenth Circuit in *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western R.R.*, 411 F.2d 1115 (10th Cir. 1969).

Simply put, the decision below conforms with the well-established precedent on this issue, and there is no basis under the RLA for petitioners' expressions.

IV. THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT

Petitioners' final claim is that the decision below "frustrates industrial self-government and labor harmony," "will result in labor chaos," and "eviscerate the collective bargaining process in the railroad industry." (MoPac Pet. 16). This claim is based on an erroneous view of what the Court of Appeals decided in this case. For example, the Fifth Circuit clearly stated:

> "The right to associate freely with a national union of an employee's own choosing, and the effects of the exercise of that right, however, are not unlimited. In the instant case, for example, the BLE switchmen are not entitled to have BLE negotiate a separate collective bargaining agreement for them; rather, the terms and conditions of their employment necessarily are governed by the MOPAC-UTU agreement covering switchmen. *See, e.g., Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). On the other hand, given the apparent importance Congress attached to freedom of choice, that right should be limited only when compelled by express language of the RLA. We find neither statutory language mandating such a result nor compelling reason to limit the right of free choice in the instant case." (MoPac Pet. App., 7a).

In anticipation of petitioners' argument, the Fifth Circuit concluded: "We further note that our holding today creates no conflict between the RLA policy of freedom of union choice for the employee and the stated goals of company-level settlement of disputes, 45 U.S.C. §152 First, and the transcending desire for labor-management stability." (MoPac Pet. App., 9a). Thus, the holding of the Court of Appeals does not negate the collective bargaining process or frustrate industrial self-government. The majority representative negotiates the agreement and its interpretation is placed upon that agreement in the grievance-arbitration process.

Moreover, the scheme of membership choice and representation in the railroad operating crafts is a fine tuned one that has served well for over fifty years. Throughout those years, the lack of exclusivity in the operating crafts has not led to chaos or lack of uniformity in application of agreements. MoPac has lived with that system, so it is difficult to understand its qualms at this point in time. For over 35 years, operating employees have belonged to any union, national in scope, and admitting those persons into its membership that choose to join. Yet no one has claimed that this fostering of minority unions has eviscerated the collective bargaining process in the railroad industry. The fathers of the RLA incorporated the procedures prevailing in 1934 to permit any union to represent an employee at all stages of the grievance-arbitration process. These procedures continued through 1966, and were reaffirmed by Congress in the amendments to Section 3, Second. None of the dire events predicted by petitioners has ever arisen.

Accordingly, the determination raises no issue involving federal railway labor policy which warrants review by this Court.

CONCLUSION

For the foregoing reasons the petitions should be denied.

Respectfully submitted,

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313
Counsel for Respondents

APPENDIX

APPENDIX A

Affidavit of M. L. Royal

Civil Action No. 84-700

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
Section "H"
Magistrate Division 2

W. G. TAYLOR, K. P. BROCKHOEFT, A. J. RUIZ, WAYNE A. SEPCICH and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY and UNITED TRANSPORTATION UNION,
Defendants.

AFFIDAVIT OF M. L. ROYAL

STATE OF TEXAS)
) SS:
COUNTY OF BOWIE)

M. L. ROYAL, being first duly sworn, deposes and says:

(1) I am, and have been since 1971, General Chairman of the General Committee of Adjustment, Brotherhood of Locomotive Engineers, on the Missouri Pacific Railroad Company-Former Texas & Pacific (hereinafter "MoPac"), Texas Pacific-Missouri Pacific Terminal Rail-

road and Fort Worth & Denver Railway. The offices of the General Committee are located at Room 112 Cervini Building, 1001 Texas Boulevard, Texarkana, Texas 75501. This affidavit is made in support of the motion for summary judgment submitted by W. G. Taylor, K. P. Brockhoeft, A. J. Ruiz, Wayne A. Sepcich and the Brotherhood of Locomotive Engineers (hereinafter "BLE"), plaintiffs herein.

(2) W. G. Taylor, K. P. Brockhoeft, A. J. Ruiz and Wayne A. Sepcich are citizens of Louisiana and the United States and reside within the judicial district for the Eastern District of Louisiana. They are employed by MoPac at its Avondale, Louisiana Yard, and have seniority in the craft of switchmen, which are sometimes referred to as "yardmen". These individuals also have first preference to transfer into the craft of locomotive firemen at MoPac's Avondale Yard from which they will be eligible for promotion into the craft of locomotive engineers. Taylor has qualified and does hold seniority as a locomotive engineer for MoPac. When business conditions are such that Taylor and other switchmen who have acquired seniority as locomotive engineers are not able to hold positions as locomotive engineers or firemen, they flow back into the craft of switchmen and work as switchmen until they can again hold a position in the craft of locomotive firemen or the craft of locomotive engineers.

(3) BLE is a labor organization and an unincorporated association with its principal offices located at 1110 Engineers Building, Cleveland, Ohio 44114. BLE represents in collective bargaining numerous employees of various "carriers", within the meaning of Section 1, first of the Railway Labor Act, 45 U.S.C. Section 151, First, and

employees of MoPac. BLE is a "representative" of "employees" within the meaning of Section 1 of the Railway Labor Act, 45 U.S.C. Section 151. Since well into the nineteenth century and up until the present, the collective bargaining representative on most of the nation's railroads, with few exceptions, has been BLE. BLE also is the collective bargaining representative for the craft of firemen on some railroads, such as the Louisville and Nashville, Long Island and Grand Trunk Western. BLE is further an organization, national in scope, and admits to membership employees in engine, train, yard and hostling service, within the meaning of Section 2, Eleventh (c) of the Railway Labor Act, 45 U.S.C. Section 152, Eleventh (c). Said membership is offered pursuant to Section 26 Statutes, Constitution and Bylaws of the International BLE, which states: "membership may also be extended to other groups of employees, when in the opinion of the International President, or Executive Committee, such action would be advantageous to the Brotherhood of Locomotive Engineers." Membership in the BLE satisfies the union shop membership requirements contained in UTU agreements. Also, BLE is qualified to appoint two labor members of the First Division of the National Railroad Adjustment Board pursuant to Section 3, First (h) of the Railway Labor Act, 45 U.S.C. Section 153, First (h). The First Division has jurisdiction over disputes involving engineers, firemen, hostlers, conductors, trainmen and switchmen.

(4) MoPac is a corporation organized and existing under and by virtue of the laws of Delaware. It is a common carrier by rail engaged in interstate operations and subject to the provisions of the Interstate Commerce Act, 49 U.S.C. Section 1, *et seq.* MoPac is subject to

federal law relating to collective bargaining, employee disputes, and employee representation matters as set forth in the Railway Labor Act. MoPac operates a line of railroad and is doing business within the judicial district for the Eastern District of Louisiana.

(5) United Transportation Union (hereinafter "UTU") is a railroad labor organization, national in scope, and organized in accordance with the provisions of the Railway Labor Act, 45 U.S.C. Section 151, *et seq.*, with its headquarters and principal offices located in Lakewood, Ohio. UTU is the duly designated collective bargaining representative pursuant to the Railway Labor Act for the crafts of switchmen and firemen employed on the MoPac. It also is the craft representative for conductors and brakemen on MoPac. UTU admits to membership and collects dues from employees working for MoPac and other carriers in Louisiana and is doing business within the judicial district for the Eastern District of Louisiana.

(6) Each of the individuals named in paragraph 2 of this affidavit has been at all time material hereto a member of BLE; some of the individuals have from time to time been members of UTU.

(7) While working as an engineer, the rates of pay, rules and working conditions for Taylor and other switchmen who have been promoted to locomotive engineers are set by agreement between BLE and MoPac. While working as switchmen, the rates of pay, rules and working conditions for those individuals are set by agreement between UTU and MoPac. On or about January 1, 1984. Taylor was furloughed as an engineer and fireman and. along with Ruiz and Sepcich, was working as a switchman.

(8) On January 13, 1984, BLE Local Chairman W. L. Lanassa sought to represent switchmen at a time claim

conference with MoPac (Exhibit 1). By letter dated January 13, 1984, K. L. Cargile, MoPac Assistant Superintendent refused the request citing Article 23 of the UTU-MoPac agreement. (Exhibit 2). The position taken by Mr. Cargile was consistent with the position taken by O. B. Sayers, MoPac Assistant Vice President, Labor Relations, in a letter dated December 30, 1983 to BLE Vice President E. E. Watson. (Exhibit 3).

(9) In or about January, 1984, Taylor, Ruiz and Sepcich were charged with possible misconduct as switchmen under the UTU-MoPac collective bargaining agreement covering switchmen and called for an investigation by MoPac. These individuals sought to have BLE Local Chairman W. L. Lanassa as their representative at the investigation. BLE Local Chairman Lanassa was advised by MoPac that neither he, nor any BLE representative, would be permitted to represent Taylor or anyone else at the investigation scheduled for February 8, 1984. (Exhibit 4). On February 8, 1984, I attended the investigation and attempted to represent Taylor, Ruiz and Sepcich and was denied the right to represent these individuals by MoPac as seen by the transcript of the proceedings. (Exhibit 5). MoPac relied on Article 18 of the UTU-MoPac agreement at this hearing and refused to permit the individuals any representatives but one from the UTU.

(10) On other occasions, in 1983 and 1984, certain of the switchmen employed by MoPac, and members of BLE, including K. P. Brockhoeft, have sought BLE representation regarding claims and grievances, and MoPac, in such cases, has refused to treat with the BLE as such representative in regard to such claims or grievances, and further in regard to their appeal or arbitration. By letter dated August 10, 1983, I took issue with the decision made by MoPac. (Exhibit 6).

(11) On or about January 1, 1974, MoPac and UTU entered into an agreement establishing terms and conditions of employment for switchmen employed by MoPac. (Exhibit "A" attached to the complaint). Among the provisions of such contract are Articles 18 and 23 dealing with discipline and grievances and representation and rulings, respectively. In addition, Section 17 of an agreement dated August 11, 1948 provides for a time limit on claims. All said rules limit and restrict representation of switchmen in handling such to the defined "duly accredited representative", which is specified to be only a UTU representative and has been so enforced by MoPac. Moreover, Section 17 provides that "all claims or grievances involved in a decision of the highest officer shall be barred unless within six months from the date of said officers' decision proceedings are instituted by the employee or his duly authorized representative before a tribunal having jurisdiction pursuant to law." MoPac supports, in part, its refusal to treat with the BLE as representative of switchmen, such as Taylor and Brockhoeft, upon said Articles 18 and 23 of the January 1, 1974 MoPac-UTU agreement and Section 17 of a MoPac-UTU agreement dated August 11, 1948.

M. L. ROYAL

Sworn to and subscribed before me this ..... day of ....., 1984.

.....

Notary Public

APPENDIX B

Affidavit of W. J. Wanke

Civil Action No. 84-700

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
Section "H"
Magistrate Division 2

W. G. TAYLOR, K. P. BROCKHOEFT, A. J. RUIZ, WAYNE A. SEPCICH and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY and UNITED TRANSPORTATION UNION,
Defendants.

AFFIDAVIT OF W. J. WANKE

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

W. J. WANKE, being first duly sworn, deposes and states as follows:

1. I am First Vice President of the International Brotherhood of Locomotive Engineers ("BLE") with offices at 1365 Ontario Street, Cleveland, Ohio. In 1964, I became Director of the Research and Schedule Department of BLE, subsequently became an International Vice

President in 1969 and was elected First Vice President in June 1980. As First Vice President, I have access to the records of BLE with respect to collective bargaining agreements and representation rights.

2. Since its formation, BLE has admitted to membership engineers and firemen, which were the basic source of engineers. As early as the 1940s, BLE took into membership and represented trainmen who had been promoted into the craft of engineers on railroads that followed that line of progression like the Pacific Electric and Sacramento Northern. In 1962, BLE amended its constitution to permit any employee eligible for promotion to engineer to become a member of BLE. By 1966, the nation's railroads were beginning to seek persons for training to become engineers from sources other than firemen, such as apprentice engineers. As time went on, most of the nation's railroads found that the period for training could be reduced if the persons training for locomotive engineers, such as apprentice engineers, came from the ranks of the train service crafts (conductors, trainmen and switchmen). After becoming apprentice engineers, firemen or engineers, many of these individuals, including train service employees, became members of BLE.

As their ranks increased, a number of these engineers with rights to jobs in the train service crafts were furloughed as engineers and returned to service in their former jobs. They, however, retained their membership in BLE, and BLE represented them in their personal grievances.

3. On July 19, 1972, UTU and the National Railway Labor Conference entered into two agreements providing

for certain manning requirements for firemen and for engineer training programs for the craft of firemen. As previously indicated, the railroads were obtaining many, if not most, of their firemen from the ranks of train service employees.

4. On August 25, 1978, UTU entered into a national agreement with the National Carriers' Conference Committee of which Missouri Pacific is a member railroad. Article VIII of this agreement codified and expanded upon the carriers' practice of employing employees represented by UTU in the train service crafts as firemen, a craft also represented by UTU. In sum, Article VIII, which is attached hereto as Exhibit "A", provides for preferential transfer rights for UTU-represented train service employees into the craft of firemen and, thus, promotion rights into the craft of locomotive engineers.

5. As a result of Article VIII of the August 25, 1978 Agreement, all conductors, trainmen and switchmen are eligible for membership in BLE, since they have promotion rights to engineer and may work in the engine service crafts and from time to time in the train service crafts when work is not available for them as firemen or engineers.

6. On January 8, 1981, Mr. Fred A. Hardin, President of UTU, was asked if an engineer upon returning to service as a brakeman could satisfy the requirements of UTU's union shop agreement by paying dues to BLE. (Exhibit "B"). In a letter dated January 19, 1981, UTU President Hardin said that trainmen-engineers could satisfy the union shop agreements by belonging to either union, UTU as the craft representative for trainmen and BLE as the craft representative for engineers and, there-

fore, a permissible alternate organization. Mr. Hardin's letter is appended hereto as Exhibit "C". In fact, even if BLE were not a craft representative on MoPac, a switchman's membership therein would satisfy the statutory alternate membership provision.

7. On January 1, 1983, the National Railroad Passenger Corporation (Amtrak) began operations of passenger service in the Northeast Corridor of the United States with its own equipment and own operating crews. BLE is the collective bargaining representative for the craft of locomotive engineers. UTU is the representative for conductors and for engine attendants, a new craft or class of employees that did not previously exist. In other words, there was a new carrier with a new craft. On Amtrak, there is no connection whatsoever between the engineers, engine attendants or conductors. The agreement entered into by BLE for Amtrak engineers permits engineers to be represented only by BLE in grievances and disciplinary matters. UTU has similar agreement provisions for the crafts represented by it. On November 14, 1983, UTU and one of its members, John Peters, an Amtrak engineer, brought suit to require Amtrak to allow UTU to represent Peters in grievance handling. The complaint in this case is patterned after the complaint in *John D. Peters, et al. v. National Railroad Passenger Corp., et al.*, Case No. 83-3431, in the United States District Court for the District of Columbia, a copy of which is attached hereto as Exhibit "D".

8. The Amtrak or Peters case involved a first time contract on a new carrier so that there was no historical practice of claim handling. UTU, however, has attempted to take the same position in that case which it tries to make here.

9. The practices referred to in UTU Nelson's affidavit are not significantly different today than they were in 1968 or in 1945 or in 1934, prior to the passage of the Railway Labor Act. Other than name changes and a flow of employees throughout the operating crafts, rather than within the engine service crafts and the train service crafts, operating employees hold seniority in the various crafts, have promotion and transfer rights between UTU and BLE crafts, are organized in crafts represented by the two unions, and can belong to BLE in satisfaction of the union shop agreement covering them when working as switchmen.

10. Contrary to the inference in UTU Nelson's affidavit, the usual manner of handling grievances has nothing to do with union representation of those grievances but to the grievance steps or stages prior to submitting the claim or grievance to arbitration before the First Division of the National Railroad Adjustment Board as provided in Section 3, First of the Railway Labor Act. Section 3, First (i) of the Railway Labor Act was contained in the 1934 enactment. In 1934, railroad employees were not fully organized, and there were a number of company unions. In those instances, there was no grievance procedure with a "usual manner" of permitting any union representation. Moreover, there were eighteen crafts represented by unions other than the BLE and the predecessors of UTU, and none of those eighteen crafts had any similarity to the situation discussed by UTU's Mr. Nelson about union representation. Since there was no uniform or customary treatment of union representation in grievance handling at that time, Congress could not have been referring to that subject. Rather the theory at that time related to individual treatment. Clearly, therefore, Congress had reference to the procedural steps followed on

the individual carrier properties at that time when it used "usual manner" in the statutory provision.

/s/ W. J. WANKE
W. J. WANKE

SWORN TO and subscribed before me this 23rd day of May 1984.

/s/ HAROLD A. ROSS
Notary Public

Exhibit "C"

UNITED TRANSPORTATION UNION

FRED A. HARDIN
International President
R. R. BRYANT, CLYDE F. LANE
Assistant Presidents
JOHN H. SHEPHERD
General Secretary and Treasurer

14000 Detroit Avenue
Cleveland, Ohio 44107
Phone: 216-776-9400

1202 January 19, 1981

Mr. W. H. Pelton, GC, UTU
Norfolk and Western Railway
817 Kilbourne Street
Bellevue, OH 44811

Dear Sir and Brother:

This will acknowledge and reply to your letter of January 8, 1981 advising that you are experiencing a problem at Conneaut, Ohio, in Local 421, with several individuals who participated in and successfully completed the enginemen's training program per Article VIII of the 1978 National Agreement. You advise that after entering engine service the employees chose to leave the United Transportation Union and join the BLE but that recently they had been furloughed from engine service and under the agreement had returned to brakeman status but continued to pay dues to the BLE. You further advise that you have discussed this matter with General Chairman Voyk who advised that his International had taken the position that, since the employes in question were actually employed in engine service and joined the BLE, they could continue to pay dues to the BLE even though they returned to the rank of Brakeman.

You requested that I advise whether or not the aforementioned employes must resume paying dues to the UTU or can they continue paying to the BLE even though working as brakemen, keeping in mind that you do have a Union Shop Agreement in effect on this property. I was aware that you had a Union Shop Agreement on your property. Union Shop Agreements are authorized by a specific provision of the Railway Labor Act. The provisions of the Railway Labor Act that authorize the making of Union Shop Agreements contain language which in effect says that, if an individual (in the operating crafts, that is, engineers, firemen, conductors, brakemen and yardmen) can comply with any Union Shop Agreement by belonging to any organization national in scope, having a representative on Division One. The BLE, of course, is national in scope and has a representative on Division One. If the individuals you mentioned are members of the BLE, then that would constitute compliance with our Union Shop Agreement. The same situation would be true if these individuals elected to retain their membership in UTU while working as engineers and declined to join the ELE. It is my understanding that in the past the BLE has not admitted to membership anyone who did not have "seniority rights" to engine service. That is, they normally did not admit to membership a brakeman or conductor unless he had some seniority rights in engine service. The individuals to whom you make reference obviously have seniority rights as brakemen and also as firemen and engineers. Therefore, the position taken by the BLE is consistent with positions taken in prior years in similar situations.

In the operating crafts an employee has a choice between two unions (provided that either the two unions

will admit him to membership) to belong to in order to comply with a Union Shop Agreement. When this Union Shop provision was enacted in the early 1950's there were only isolated instances where groundmen also held seniority in engine service, therefore, the application of the provision applied mainly to situations involving the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America. It was not uncommon prior to the formation of the UTU for groundmen to belong to different organizations on the same property. It is only since we have made some agreements permitting groundmen to transfer to engine service that we have been confronted with this problem of the individual being furloughed from engine service and resuming service as a groundman. I believe that this will be a temporary situation, however, under the law an individual in the situation you describe can belong to either organization and comply with a Union Shop Agreement.

With kindest regards, I remain

Fraternally yours,

/s/ FRED A. HARDIN
President

cc: John Sytsma, Pres., BLE
J. L. Voyk, GC-BLE
J. P. Koontz, LC-421
W. O. Weber, Sec-421